DOCKET

No. 13-1080

Title: Department of Transportation. et al., Petitioners
v.
Association of American Railroads

Docketed: March 11, 2014

Linked with 13A678

Lower Ct: United States Court of Appeals for the District of Columbia Circuit

Case Nos.: (12-5204)

Decision Date: July 2, 2013

Rehearing Denied: October 11, 2013

Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Dec 27 2013	Application (13A678) to extend the time to file a petition for a writ of certiorari from January 9, 2014 to February 7, 2014, submitted to The Chief Justice.
Dec 31 2013	Application (13A678) granted by The Chief Justice extending the time to file until February 7, 2014.
Jan 27 2014	Application (13A678) to extend further the time from February 7, 2014 to March 10, 2014, submitted to The Chief Justice.
Jan 28 2014	Application (13A678) granted by The Chief Justice extending the time to file until March 10, 2014.
Mar 10 2014	Petition for a writ of certiorari filed. (Response due April 10, 2014)
Mar 18 2014	Order extending time to file response to petition to and including May 12, 2014.
Apr 10 2014	Brief amicus curiae of Professor Alexander Volokh filed.
May 12 2014	Brief of respondent Association of American Railroads in opposition filed.
May 27 2014	DISTRIBUTED for Conference of June 12, 2014.
May 28 2014	Reply of petitioner Department of Transportation filed. (Distributed)
Jun 16 2014	DISTRIBUTED for Conference of June 19, 2014.
Jun 23 2014	Petition GRANTED.
Jul 21 2014	The time to file the joint appendix and petitioners' brief on the merits is extended to and including August 14, 2014.
Jul 21 2014	The time to file respondent's brief on the merits is extended to and including September 22, 2014.
Aug 14 2014	Joint appendix filed. (Statement of costs filed.)
Aug 14 2014	Brief of petitioner Department of Transportation filed.
Aug 21 2014	Brief amici curiae of Environmental Law and Policy Center, et al. filed.
Sep 4 2014	SET FOR ARGUMENT on Monday, December 8, 2014.

Sep 22 2014	Brief of respondent Association of American Railroads filed.
Sep 22 2014	Record requested from U.S.C.A. District of Columbia Circuit.
Sep 26 2014	Record received from U.S.C.A. District of Columbia Circuit, the record is electronic.
Sep 29 2014	Brief amicus curiae of Association of Independent Passenger Rail Operators filed.
Sep 29 2014	Brief amicus curiae of Resolute Forest Products Inc. filed.
Sep 29 2014	Brief amici curiae of Cato Institute, et al. filed.
Sep 29 2014	Brief amici curiae of American Council of Trustees and Alumni, et al. filed.
Sep 29 2014	Brief amicus curiae of Center for Constitutional Jurisprudence filed.
Sep 29 2014	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Sep 29 2014	Brief amicus curiae of Center for the Rule of Law filed.
Sep 29 2014	Brief amicus curiae of Professor Alexander Volokh filed.
Oct 22 2014	Reply of petitioner Department of Transportation filed.
Oct 27 2014	CIRCULATED.
Dec 8 2014	Argued. For petitioners: Curtis E. Gannon, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondent: Thomas H. Dupree, Jr., Washington, D. C.
Dec 19 2014	Letter from counsel for the petitioners updating authority. (Distributed)
Mar 9 2015	Judgment VACATED and case REMANDED. Kennedy, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Ginsburg, Breyer, Alito, Sotomayor, and Kagan, JJ., joined. Alito, J., filed a concurring opinion. Thomas, J., filed an opinion concurring in the judgment.
Apr 10 2015	JUDGMENT ISSUED

PETITION FOR WRIT OF CERTIORARI

13-1080

No.

In the Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

ASSOCIATION OF AMERICAN RAILROADS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 207(a) of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, Div. B, 122 Stat. 4916, requires that the Federal Railroad Administration (FRA) and Amtrak "jointly * * * develop" the metrics and standards for Amtrak's performance that will be used in part to determine whether the Surface Transportation Board (STB) will investigate a freight railroad for failing to provide the preference for Amtrak's passenger trains that is required by 49 U.S.C. 24308(c) (Supp. V 2011). In the event that the FRA and Amtrak cannot agree on the metrics and standards within 180 days, Section 207(d) of the Act provides for the STB to "appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." 122 Stat. 4917. The question presented is whether Section 207 effects an unconstitutional delegation of legislative power to a private entity.

PARTIES TO THE PROCEEDINGS

The four petitioners were the appellees in the court of appeals: the United States Department of Transportation; Anthony Foxx, in his official capacity as Secretary of Transportation; the Federal Railroad Administration; and Joseph C. Szabo, in his official capacity as the Administrator of the Federal Railroad Administration.

The only appellant in the court of appeals was respondent Association of American Railroads.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Department of Transportation and its Secretary, as well as the Federal Railroad Administration and its Administrator, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 721 F.3d 666. The opinion of the district court (App., *infra*, 24a-50a), is reported at 865 F. Supp. 2d 22.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2013. A petition for rehearing was denied on October 11, 2013 (App., *infra*, 51a-52a). On December

31, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 7, 2014. On January 28, 2014, the Chief Justice further extended the time to March 10, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1 of the Constitution provides in relevant part: "All legislative powers herein granted shall be vested in a Congress of the United States." Pertinent statutory provisions are reprinted in an appendix to this petition. App., *infra*, 53a-71a.

STATEMENT

1. a. Before 1970, railroads offering intercity passenger service in the United States were, as common carriers, generally obligated to continue to do so until relieved of their passenger-service obligations by the Interstate Commerce Commission or state regulatory authorities. *National R.R. Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 454 (1985). Although many railroads sought to discontinue those operations, Congress determined that "the public convenience and necessity require[d] the continuance and improvement" of passenger-rail service. Rail Passenger Service Act of 1970, Pub. L. No. 91-518, § 101, 84 Stat. 1328. Accordingly, in 1970, Congress established the National Railroad Passenger Corporation (Amtrak) to serve as the successor to those railroads abandoning passenger-rail service (*id.* §§ 301, 401(a), 84 Stat. 1330, 1334-1335), thereby "avert[ing] the threatened extinction of passenger trains in the United States." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 383 (1995).

Congress has declared that Amtrak is "not a department, agency, or instrumentality of the United States Government," and it has directed that Amtrak be "operated * * * as a for-profit corporation." 49 U.S.C. 24301(a)(2) and (3).[1] But it has also required Amtrak to pursue various other public objectives. See, *e.g.*, 49 U.S.C. 24101(c), 24902(b). And Congress has subjected Amtrak to government oversight and control through a variety of mechanisms, including the appointment of eight of Amtrak's nine directors by the President with the advice and consent of the Senate (with the ninth director, the President of Amtrak, being appointed by the other eight). 49 U.S.C. 24302(a)(1), 24303(a).

As a condition of relieving railroads of passenger-rail-service obligations, Congress required railroads to allow Amtrak to use their tracks and facilities, at rates either agreed to by Amtrak and the host railroads or prescribed by the Surface Transportation Board (STB). 49 U.S.C. 24308(a). In addition, to ensure the "improvement" of passenger-rail service for the public good, in 1973 Congress granted Amtrak a general preference over freight transportation in using rail facilities, specifying that "[e]xcept in an emergency, intercity and commuter rail passenger transportation provided by or for Amtrak has preference over freight transportation in using a rail line, junction, or crossing unless the [STB] orders otherwise under this subsection." 49 U.S.C. 24308(c); see Amtrak Improvement Act of 1973, Pub. L. No. 93-146, § 10(2), 87 Stat. 552 (initial version). Since then, Congress has remained

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[1] All citations to Title 49 of the United States Code in this petition reflect the 2006 volume and any amendments shown in the 2011 supplement.

closely involved with Amtrak's operations, enacting several statutes aimed at improving Amtrak's service,[2] and providing annual appropriations to ensure Amtrak's continued operations, see, *e.g.*, Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, Div. C, Tit. II, 125 Stat. 659-660 (appropriating more than $1.4 billion for Amtrak).

b. This case concerns Congress's most recent effort to enhance passenger-rail performance and service: the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Pub. L. No. 110-432, Div. B, 122 Stat. 4907. Section 207(a) of the PRIIA provided that, within 180 days of its October 2008 enactment,

> the *Federal Railroad Administration and Amtrak shall jointly*, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, *develop new or improve existing metrics and minimum standards* for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services.

49 U.S.C. 24101 note (emphases added). The statute further provided that, if the metrics and standards

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[2] See, *e.g.*, Amtrak Improvement Act of 1978, Pub. L. No. 95-421, 92 Stat. 923; Amtrak Reorganization Act of 1979, Pub. L. No. 96-73, 93 Stat. 537; Amtrak Improvement Act of 1981, Pub. L. No. 97-35, §§ 1170-1189, 95 Stat. 687-699; Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, 111 Stat. 2570.

were not completed within 180 days, "any party involved in the development of those standards [could] petition the [STB] to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." 49 U.S.C. 24101 note (PRIIA § 207(d)).

Congress specified that, once the metrics and standards were developed, Amtrak would use them for various purposes, including annual evaluations of its performance, the development of performance improvement plans for long-distance routes, and the development and implementation of a plan to improve on-board service. 49 U.S.C. 24710(a)-(b); 49 U.S.C. 24101 note (PRIIA § 222). Congress also instructed that, "[t]o the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards * * * into their access and service agreements." 49 U.S.C. 24101 note (PRIIA § 207(c)).

The PRIIA also provided that certain investigations by the STB may or shall be initiated in the event of sustained failures by any Amtrak intercity passenger train to meet the minimum standards developed pursuant to Section 207. 49 U.S.C. 24308(f)(1).[3] In such investigations, the STB "shall obtain information from all parties involved." *Ibid.* It may then "review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to de-

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[3] The statute specifies that, when the standards have not been satisfied for two consecutive calendar quarters, the STB itself "may initiate an investigation," or, alternatively, that the STB "shall initiate such an investigation" "upon the filing of a complaint by Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service." 49 U.S.C. 24308(f)(1).

lays." *Ibid.* Following an investigation, the STB may choose to "award damages against" a host railroad if the STB determines that Amtrak's substandard performance is attributable to the "rail carrier's failure to provide preference to Amtrak over freight transportation as required" by the pre-existing preference provision in 49 U.S.C. 24308(c). 49 U.S.C. 24308(f)(2). If the STB deems it appropriate for damages to be remitted to Amtrak, then Amtrak must use them "for capital or operating expenditures on the routes over which delays" were the result of the host railroad's failure to grant the statutorily required preference to Amtrak. 49 U.S.C. 24308(f)(4).

2. In March 2009, the Federal Railroad Administration (FRA) and Amtrak, acting pursuant to Section 207(a) of the PRIIA, jointly issued a draft version of the metrics and standards, C.A. App. 23-56, and sought comments from the various stakeholders identified in the statute, including freight railroads, 74 Fed. Reg. 10,983 (Mar. 13, 2009). After receiving and considering comments, the FRA and Amtrak issued the final version of the metrics and standards in May 2010. C.A. App. 59-97.[4] Some of the metrics involve Amtrak's financial performance, for which the associated standard is that there be "[c]ontinuous year-over-year improvement on a moving eight-quarter average basis." *Id.* at 83. The on-time performance metrics apply to the ends of each route as well as to all station stops. *Id.* at 84-85; see 49 U.S.C. 24101(c)(4) (calling for "station stops within 15 minutes of the time estab-

[4] The metrics and standards themselves appear at C.A. App. 83-88, which are also available at FRA, Dep't of Transp., *Metric and Standards for Intercity Passenger Rail Service* 25-30 (May 12, 2010), www.fra.dot.gov/Elib/Document/1511.

lished in public timetables"). The standards associated with those metrics require on-time performance at least 80% to 95% of the time for each route, depending on the route and year. C.A. App. 84-85. The standards associated with train delays specify a maximum number of "minutes [of delay] per 10,000 Train-Miles," ranging from 265 to 900. *Id.* at 85-86. Other metrics and standards involve minimum customer-satisfaction rates in surveys, *id.* at 87, and some metrics (*e.g.*, the percentage of passengers connecting to or from other routes, or the percentage of passenger-trips to or from underserved communities) have no associated standards, *id.* at 87-88.

3. In August 2011, respondent—an association representing large freight railroads that own tracks on which Amtrak operates—commenced this suit against petitioners in the United States District Court for the District of Columbia. C.A. App. 2; App., *infra*, 30a-31a.[5] Respondent advanced two claims. First, it contended that "Section 207 of PRIIA violates the nondelegation doctrine and the separation of powers principle by placing legislative and rulemaking authority in the hands of a private entity [Amtrak] that participates in the very industry it is supposed to regulate." C.A. App. 20 (Compl. ¶ 51). Second, it contended that Section 207 violates the Fifth Amendment's Due Process Clause by "[v]esting the coercive power of the

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[5] Although Amtrak is also a member of respondent's association (App., *infra*, 30a-31a), petitioners did not challenge respondent's ability to represent the freight railroads. See *Humane Soc'y of the United States* v. *Hodel*, 840 F.2d 45, 59 n.25 (D.C. Cir. 1988) (observing that an organization's "internal conflict" is not "a basis for defeating associational standing").

government in interested private parties." *Id.* at 21 (Compl. ¶¶ 53-54).

In addition to a declaration of Section 207's unconstitutionality, respondent sought vacatur of the Amtrak-performance metrics and standards, the issuance of an injunction against any action by the Department of Transportation or the FRA pursuant to the metrics and standards or Section 207 (and that any such actions previously taken be declared null and void), and an award of "reasonable costs, including attorney's fees." C.A. App. 21.

The district court granted summary judgment in favor of petitioners. App., *infra*, 24a-50a. The court noted that both of respondent's claims for relief depend on the premise that Amtrak is a private rather than governmental entity. *Id.* at 34a. With respect to respondent's due-process claim, the court determined that, under this Court's decision in *Lebron*, "Amtrak is the government in the context of claims that invoke the Constitution's guarantees of individual rights." *Id.* at 42a. Accordingly, it held that Section 207 does not impermissibly vest "regulatory authority" in an "interested private part[y]." *Id.* at 35a.

With respect to respondent's nondelegation claim, the district court held that "[e]ven if Amtrak is a private entity, as [respondent] contends, the government retains ultimate control over the promulgation of the [m]etrics and [s]tandards," and Section 207 therefore "passes constitutional muster." App., *infra*, 43a-44a. The court emphasized that "Amtrak could not have promulgated [the metrics and standards] without the FRA's approval" and that "the STB also retains control over their enforcement." *Id.* at 46a. Moreover, the court concluded that, "even if the involvement of

these agencies is not enough to ensure the constitutionality of [Section] 207's delegation, the government retains structural control over Amtrak itself." *Ibid.* The court concluded that "[t]aken together, the involvement of the FRA in promulgating the regulations, the role of the STB in their enforcement, and the government's structural control over Amtrak itself more than suffice" to render the statute constitutional. *Id.* at 49a.

4. The court of appeals reversed, App., *infra*, 1a-23a, holding that Section 207 "constitutes an unlawful delegation of regulatory power to a private entity," *id.* at 3a.

The court of appeals acknowledged that Section 207 bears a "passing resemblance" to statutory frameworks that this Court sustained against delegation challenges in *Currin* v. *Wallace*, 306 U.S. 1 (1939), and *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940). App., *infra*, 9a. It also acknowledged that "no court has invalidated a scheme like [Section] 207's." *Id.* at 12a. But it concluded that "[n]o case prefigures the unprecedented regulatory powers delegated to Amtrak." *Id.* at 10a.

Despite the FRA's role in devising and approving the Amtrak-performance metrics and standards, the court of appeals noted that the FRA was "impotent" to "choose its [own] version without Amtrak's permission." App., *infra*, 10a. The court found further cause for concern in the provision requiring that any impasse between Amtrak and the FRA be resolved by having the STB "appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." *Id.* at 14a (quoting 49 U.S.C. 24101 note (PRIIA § 207(d)). The court rejected the government's sug-

gestion that the statute's reference to "an arbitrator" could be construed, if necessary to avoid serious constitutional concerns, as authorizing the STB to appoint only a governmental official as the arbitrator. *Id.* at 15a n.7.

Although the court of appeals recognized that "the metrics and standards themselves impose no liability," it nevertheless concluded that Amtrak's ability to participate in their approval reflects the kind of power that cannot be delegated to a private entity because they "lend definite regulatory force to an otherwise broad statutory mandate." App., *infra*, 11a, 12a. The court therefore concluded that, "[u]nless it can be established that Amtrak is an organ of the government, * * * [Section] 207 is an unconstitutional delegation of regulatory power to a private party." *Id.* at 16a.

The court of appeals recognized that "[m]any of the details of Amtrak's makeup support the government's position that it is not a private entity of the sort described in" *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), the last case in which this Court invalidated an Act of Congress under the nondelegation doctrine. App., *infra*, 16a. But the court of appeals emphasized Congress's declarations that "Amtrak 'shall be operated and managed as a for-profit corporation' and 'is not a department, agency, or instrumentality of the United States Government.'" *Id.* at 17a (quoting 49 U.S.C. 24301(a)(2) and (3)). As a result, the court concluded that Section 207 does not adequately serve what it saw as the "functional purposes" for distinguishing between public and private entities "when it comes to delegating regulatory power." *Id.* at 18a. The court held that allowing Amtrak to play a role in drafting the

metrics and standards for evaluating Amtrak's own performance fails to serve two such purposes. First, it does not promote "democratic accountability," because Congress has denominated Amtrak a "for-profit corporation" rather than a "department, agency, or instrumentality of the United States Government." *Ibid.* (citations omitted). Second, it does not promote "the public good," because, the court believed, "[n]othing about the government's involvement in Amtrak's operations restrains the corporation from devising metrics and standards that inure to its own financial benefit rather than the common good." *Id.* at 19a, 20a.

Accordingly, the court of appeals held that, "as a private entity, Amtrak cannot be granted the regulatory power prescribed in [Section] 207." App., *infra*, 23a. Having invalidated the statute on the basis of respondent's nondelegation claim, the court found it unnecessary to reach the due-process claim. *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals has held unconstitutional a key component of Congress's most recent effort to improve passenger-rail service in the United States by providing for the establishment of metrics and standards for evaluating Amtrak's performance. Under respondent's view, the Amtrak-performance metrics and standards that were jointly developed by the Federal Railroad Administration and Amtrak in 2009-2010 must therefore be vacated and all actions taken pursuant to those standards by the Department of Transportation and the FRA must be declared null and void. See p. 8, *supra*. The court of appeals conceded that there is no direct precedent for its holding. App., *infra*, 12a. Its decision is not supported by this Court's decisions, which have not invalidated a federal statute in nearly

80 years on the ground that it impermissibly delegated authority to a private party. Indeed, this Court has repeatedly sustained the constitutionality of Acts of Congress under which certain provisions could not take effect without the approval of private entities. And the Court has held that Amtrak itself is to be considered a governmental actor, rather than a private entity, for at least certain constitutional purposes. Review of the decision below is therefore warranted.

A. The Government Retained Sufficient Control Over The Development And Application Of The Amtrak-Performance Metrics And Standards To Avoid Nondelegation Concerns

Nondelegation challenges often involve questions about whether Congress has supplied an "intelligible principle" for the responsible decision-maker to apply. *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928); see also *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). Respondent does not contend that Section 207 of the PRIIA lacks intelligible principles to guide the FRA and Amtrak, and it does not challenge the provision on that basis.

Instead, respondent contends that Section 207 is unconstitutional because it permits Amtrak (acting jointly with the FRA) to develop the metrics and standards that are to be used to judge Amtrak's performance. In respondent's view, "the nondelegation doctrine bars delegations to nongovernmental parties, *period*." Resp. C.A. Resp. to Pet. for Reh'g 12. But, assuming *arguendo* that Amtrak should be deemed a private entity for purposes of nondelegation analysis, the role Congress assigned to Amtrak does not present nondelegation concerns because indisputably governmental entities had sufficient control over the devel-

opment and adoption of the standards in the first instance. And they also have sufficient control over any enforcement actions against the freight railroads represented by respondent, which would be based upon an independent statutory mandate.

1. Congress may condition the effectiveness of regulatory provisions on the involvement or approval of private entities

a. It has been nearly 80 years since this Court invalidated an Act of Congress on the ground that it delegated too much authority to a private party. In *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), the Court struck down a statute that required all coal producers to accept the maximum labor hours and minimum wages negotiated by the producers of more than two-thirds of the annual coal tonnage and representatives of more than half of the mine workers. *Id.* at 283-284, 310-312. In that case, the government had no involvement in the creation or approval of those binding provisions, which were instead devised and approved entirely by private entities.

After *Carter Coal*, however, the Court sustained the validity of statutes that permitted private parties to play a significant role in the process of formulating or imposing new regulatory provisions. In doing so, it recognized that "[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality" in fashioning statutory schemes involving private parties. *Currin* v. *Wallace*, 306 U.S. 1, 15 (1939); see also, *e.g.*, *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940); *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939).

b. The court of appeals held that Section 207 of the PRIIA delegated "unprecedented regulatory powers" to Amtrak because the requirement that the standards and metrics be "jointly" promulgated by the FRA and Amtrak meant that, if the FRA had "prefer[red] an alternative to Amtrak's proposed metrics and standards," it would have been "impotent to choose its [own] version without Amtrak's permission." App., *infra*, 10a. In fact, however, this Court has repeatedly approved statutory schemes under which particular standards were subject to private parties' veto powers.

In *Currin*, *supra*, the inspection and certification standards could not be applied to tobacco markets designated by the Secretary of Agriculture "unless two thirds of the [tobacco] growers [in that market], voting at a prescribed referendum," approved their application. 306 U.S. at 6. The Court acknowledged that such a scheme "placed a restriction upon [the government's] own regulation," but rejected the contention that it constituted an impermissible "delegation of legislative authority." *Id.* at 15-16. The Court upheld a similar statutory scheme in *Rock Royal Co-operative*, *supra*, which prevented an order governing minimum milk prices paid by handlers from becoming effective unless it was approved by two-thirds of the milk producers in the relevant marketing area. 307 U.S. at 547-548. The Court again held that, so long as Congress had the power to put the order into effect "without the approval of anyone," then the "requirement of [the private producers'] approval would not be an invalid delegation." *Id.* at 577-578.

In this case, the court of appeals believed *Currin* was distinguishable because it involved "the collective participation of two thirds of industry members" ra-

ther than "a statute that favored a single firm over all its market rivals." App., *infra*, 10a n.4. But there is no question that the establishment of particular minimum prices in *Currin* would advantage or disadvantage some participants *vis-à-vis* other participants in the tobacco market. Even more to the point, if the constitutional infirmity consists in allowing a private party to exercise a veto power over a governmental agency's preferred course, it would make no sense to forbid Congress from requiring an agency to secure the consent of one party (as under Section 207 of the PRIIA), and yet permit Congress to require an agency to secure the consent of many such parties (as in *Currin* and *Rock Royal Co-operative*). And here, it was entirely reasonable for Congress to provide a distinct role for Amtrak, because the metrics and standards were intended to assess Amtrak's own performance.

c. This Court has also recognized that private parties are not limited to approving or disapproving standards proposed by governmental actors. They may also play a role in the development of proposed regulatory standards. In *Sunshine Anthracite Coal*, *supra*, for instance, the Court upheld a statutory framework authorizing groups of coal producers to propose prices for coal that were then subject to approval, disapproval, or modification by the National Bituminous Coal Commission (a governmental entity). 310 U.S. at 387-388 & n.2, 399. And the Court summarily rejected a challenge to a statute authorizing a private railway association to establish standard heights for drawbars on railroad cars used in interstate commerce, even though railroads were then subject to monetary penalties for failure to comply with that requirement. See *St. Louis, Iron Mountain*

& S. Ry. v. *Taylor*, 210 U.S. 281, 286-287 (1908); Act of Mar. 2, 1893, ch. 196, §§ 5-6, 27 Stat. 531-532.

Section 207 of the PRIIA broke no new ground on this score. Unlike in *Carter Coal*, the Amtrak-performance metrics and standards could not take effect without the active oversight, participation, and assent of the FRA. Amtrak had no more involvement in the standards' development than did the coal producers in *Sunshine Anthracite Coal*. And the requirement that Amtrak agree to the standards was consistent with *Currin* and *Rock Royal Co-operative*. The court of appeals therefore erred in concluding that a private party cannot be involved in the development of a standard and that such a standard cannot be conditioned upon a private party's approval.[6]

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[6] Other courts of appeals have rejected nondelegation challenges to statutes that vested private parties with authority to disapprove regulatory standards. See *Kentucky Div., Horsemen's Benevolent & Protective Ass'n* v. *Turfway Park Racing Ass'n*, 20 F.3d 1406, 1416 (6th Cir. 1994) (rejecting challenge to federal statute giving racehorse owners veto power over racetrack's plan to permit interstate off-track betting); *Sequoia Orange Co.* v. *Yeutter*, 973 F.2d 752, 759 (9th Cir. 1992) (rejecting challenge to Secretary of Agriculture's determination to implement amendments to orange marketing order only with approval of 75% of growers (or those growing two-thirds of total crop)), as amended, 985 F.2d 1419 (9th Cir. 1993). Other courts of appeals have also upheld statutes that authorize private parties to take regulatory action subject to the approval of a governmental agency. See *Sorrell* v. *SEC*, 679 F.2d 1323, 1325 (9th Cir. 1982) (rejecting nondelegation challenge to statute allowing private self-regulatory organizations to conduct and develop rules for disciplinary proceedings concerning their members, subject to SEC review and approval); *First Jersey Secs., Inc.* v. *Bergen*, 605 F.2d 690, 697 (3d Cir. 1979) (same), cert. denied, 444 U.S. 1074 (1980); *R.H. Johnson & Co.* v. *SEC*, 198 F.2d 690, 695 (2d Cir.) (same), cert. denied, 344 U.S. 855 (1952).

d. Even assuming that it would generally be impermissible for a governmental entity (the FRA) and a purportedly private entity (Amtrak) to have "equal" authority with respect to the development and adoption of the metrics and standards (App., *infra*, 10a), the court of appeals seriously misconstrued the effect and significance of Section 207(d) of the PRIIA, which provided that if there was an impasse in promulgating the metrics and standards, any party involved in their development could "petition the [STB] to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." 49 U.S.C. 24101 note. In other words, Amtrak was ultimately not an equal partner with the FRA. Instead, the government retained the upper hand by virtue of the authority exercised by the *government-appointed* arbitrator.[7] In

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[7] The court of appeals found that the arbitration provision (which was never actually invoked) compounded the delegation problem because it did not expressly forbid "the appointment of a private party as arbitrator." App., *infra*, 14a-15a. But that conclusion runs contrary to normal principles of statutory construction, under which Congress is, in the absence of "an affirmative showing," presumed not to have authorized "delegations to non-governmental entities." *Gentiva Healthcare Corp.* v. *Sebelius*, 723 F.3d 292, 296 (D.C. Cir. 2013). In any event, if the court of appeals' constitutional concerns were valid, then principles of constitutional avoidance also counseled strongly in favor of reading the provision as contemplating a governmental, rather than private-party, arbitrator. See generally *Boos* v. *Barry*, 485 U.S. 312, 330-331 (1988) ("It is well settled that federal courts have the power to adopt narrowing constructions of federal legislation. Indeed, the federal courts have the duty to avoid constitutional difficulties by doing so if such a construction is fairly possible.") (citations omitted); see also *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 342 (1974) (applying constitutional avoidance in the context of a nondelegation challenge).

light of that authority and the FRA's required active role in adopting the metrics and standards, there is no basis for the court of appeals' conclusion that Section 207 is at all "close to the blatantly unconstitutional scheme in *Carter Coal*." App., *infra*, 14a.

2. Any future sanctions against freight railroads would be based on a governmental agency's determination that they failed to satisfy an independent statutory obligation, not the Amtrak-performance metrics and standards

The court of appeals also failed to give proper weight to the limited role the Amtrak-performance metrics and standards play with respect to the conduct of entities other than Amtrak. Put simply, the metrics and standards serve primarily as tools to measure Amtrak's own performance, not to alter freight railroads' legal rights or obligations. See *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 475 (2001) ("It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.").

The court of appeals nonetheless believed that the metrics and standards effectively impose regulatory requirements on freight railroads, App., *infra*, 11a-12a, 16a, concluding that "the metrics and standards lend definite regulatory force to an otherwise broad statutory mandate," *id.* at 12a. The court noted, for example, that respondent's members claimed they had been "forced" to take certain "immediate actions" by the metrics and standards." *Id.* at 11a n.6. That misconceives the way in which any enforcement authority would be brought to bear upon the freight railroads.

Amtrak's failure to satisfy the metrics and standards may trigger an investigation by the STB. 49

U.S.C. 24308(f)(1). But that alone is unremarkable; the law often requires the government to initiate an investigation when spurred by the actions of private parties. See, *e.g.*, 16 U.S.C. 1533(b)(3) (allowing private citizens to petition to have a species listed under the Endangered Species Act, thereby triggering consideration by the Department of the Interior or Department of Commerce). Moreover, the ensuing investigation, and any resulting sanction, will not be about applying the metrics and standards. Instead, the STB will gather information from "all parties" and evaluate "the extent to which scheduling and congestion contribute to delays." 49 U.S.C. 24308(f)(1). If, at the conclusion of its investigation, the STB requires a host railroad to pay damages, it may do so only if it has determined that Amtrak's substandard performance was attributable to the "rail carrier's failure to provide preference to Amtrak over freight transportation as required" by 49 U.S.C. 24308(c). 49 U.S.C. 24308(f)(2). In other words, even when the metrics and standards have not been satisfied, a freight railroad will face liability only if a governmental entity determines that the freight railroad failed to comply with the long-standing statutory-preference requirement, which is independent of the metrics and standards.

Under these circumstances, Amtrak's role in developing the standards intended to measure (and enable improvements in) its own performance is not at all analogous to the "scenario" conjured by the court of appeals, "in which Congress has given to General Motors the power to coauthor, alongside the Department of Transportation, regulations that will govern all automobile manufacturers." App., *infra*, 1a.

The court of appeals erred in concluding that Section 207 of the PRIIA fails to satisfy constitutional nondelegation concerns, even if Amtrak is deemed to be a private entity for these purposes.

B. The Court Of Appeals Erroneously Treated Amtrak As A Private Entity For Purposes Of Nondelegation Analysis

In any event, assuming *arguendo* that the nature of the Amtrak-performance metrics and standards, even when combined with the FRA's involvement in their promulgation and the STB's exclusive enforcement role, would preclude a private entity's participation in their development, the court of appeals still erred in holding that Amtrak is merely "a private corporation" for purposes of nondelegation analysis. App., *infra*, 16a. That holding is inconsistent with this Court's decision in *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995), and with the statutory provisions applicable to Amtrak.

1. In *Lebron*, this Court held that Amtrak "is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." 513 U.S. at 394. As the Court explained, Congress's characterization is "assuredly dispositive of Amtrak's status as a Government [or non-Government] entity for purposes of matters that are *within* Congress's control—for example, whether it is subject to statutes." *Id.* at 392. But the limits imposed by the nondelegation doctrine are—like the First Amendment and other constitutional restrictions—not statutory rules that Congress may turn on and off.

Here, the court of appeals recognized that respondent's nondelegation challenge presents "a constitution-

al question, not a statutory one." App., *infra*, 21a. It nevertheless attempted to distinguish the individual-rights holding of *Lebron* from the context of nondelegation analysis, which it described as presenting a question about "the federal government's structural powers under the Constitution." *Id.* at 22a. In the court of appeals' view, *Lebron* requires that Amtrak be subject to any "'affirmative prohibitions' on government action," but the principles in *Lebron* for determining what is properly considered governmental do not include the nondelegation doctrine, which "defines the limits of what Congress *can* do," "rather than proscribing what Congress *cannot* do." *Id.* at 22a-23a.

That thin distinction is difficult to square with this Court's recognition that structural constitutional principles protect the liberty of "individuals, too." *Bond* v. *United States*, 131 S. Ct. 2355, 2365 (2011); see also, *e.g.*, *INS* v. *Chadha*, 462 U.S. 919, 946-950, 959 (1983). Moreover, the court of appeals' reasoning is difficult to reconcile with this Court's consideration of the Appointments Clause and separation-of-powers challenges to the limitations on the removal of members of the Public Company Accounting Oversight Board (PCAOB) in *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3151-3164 (2010). While the PCAOB was—like Amtrak—"a Government-created, Government-appointed entity," *id.* at 3147, Congress specified that the PCAOB "shall not be an agency or establishment of the United States Government" and that none of the PCAOB's members, employees, or agents "shall be deemed to be an officer or employee of or agent for the Federal Government," 15 U.S.C. 7211(b). Nevertheless, this Court quoted *Lebron* in support of the proposition, uncontested by

the parties, that "the [PCAOB] is 'part of the Government' for constitutional purposes." 130 S. Ct. at 3148 (quoting *Lebron*, 513 U.S. at 397).

2. Even apart from this Court's prior cases, the court of appeals' view of Amtrak as a private entity cannot be reconciled with Amtrak's structure and purposes. The court of appeals relied (App., *infra*, 17a, 18a) on Congress's declaration that Amtrak "is not a department, agency, or instrumentality of the United States Government." 49 U.S.C. 24301(a)(3). In doing so, however, the court minimized a host of ties between Amtrak and the federal government demonstrating that Amtrak should not be considered a private entity for purposes of nondelegation analysis.

Not least, "Amtrak was created by a special statute, explicitly for the furtherance of federal governmental goals." *Lebron*, 513 U.S. at 397. One such goal (which has not yet been realized) is to turn a profit and thereby reduce Amtrak's longstanding dependence on federal subsidies. 49 U.S.C. 24101(c)(12) and (d). But Congress has also identified several competing public objectives, which prevent Amtrak from focusing exclusively on profit maximization. See, *e.g.*, 49 U.S.C. 24902(b) (enumerating seven "considerations," in "order of priority"); 49 U.S.C. 24902(c) (requiring certain improvements to "produce the maximum labor benefit from hiring individuals presently unemployed").

Congress has also provided several more direct forms of governmental control. The federal government not only owns the overwhelming majority of Amtrak's stock, App., *infra*, 16a-17a, but also "controls the operation of the corporation through its appointees," *Lebron*, 513 U.S. at 399. Indeed, that form of control has been strengthened since *Lebron* was de-

cided. Now, eight of Amtrak's nine directors (including the Secretary of Transportation, who serves as an *ex officio* board member) are appointed by the President with the advice and consent of the Senate, 49 U.S.C. 24302(a)(1), and they are understood to be removable without cause by the President, see *Holdover and Removal of Members of Amtrak's Reform Board*, 27 Op. O.L.C. 163, 166 (2003). The ninth director (Amtrak's own President) is selected by the other eight directors. 49 U.S.C. 24302(a)(1)(B), 24303(a). Congress has also established salary limits for Amtrak's officers (49 U.S.C. 24303(b)), required Amtrak to submit reports about its operations to Congress and the President (*e.g.*, 49 U.S.C. 24315(a) and (b)), and subjected Amtrak to review by the Department of Transportation's Inspector General (PRIIA §§ 203(b), 204(d), 221, 225, 227, 122 Stat. 4913, 4914, 4931, 4933, 4934) as well as by another Inspector General for Amtrak, who receives appropriations directly from Congress (Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, Div. C, Tit. III, 125 Stat. 704). Congress has made Amtrak subject to the Freedom of Information Act. See 49 U.S.C. 24301(e). And it has repeatedly "appropriate[d] for Amtrak more than a billion dollars annually." App., *infra*, 38a.

Thus, in addition to the extensive involvement of the FRA in the promulgation of the Amtrak-performance metrics and standards, the federal government's direct connections with Amtrak itself belie the court of appeals' conclusion that Congress sought to "absolv[e] the federal government of all responsibility" for the metrics and standards. App., *infra*, 21a. Contrary to that court's fears, giving the government-

created, government-controlled, and government-subsidized Amtrak a role in the development of the metrics and standards to assess its own performance did not make it possible to evade public criticism by claiming that any flaws in the resulting standards are therefore "not the federal government's fault." *Id.* at 18a.

The court of appeals thus erred in concluding that Amtrak should be treated as a merely private entity for purposes of nondelegation analysis.

C. The Court Of Appeals' Invalidation Of An Important Component Of An Act Of Congress Warrants This Court's Review

This Court should grant review because the court of appeals has held unconstitutional an important provision of an Act of Congress. This Court has often reviewed lower-court decisions holding that a federal law is unconstitutional, even in the absence of a circuit split. See, *e.g.*, *United States* v. *Alvarez*, 132 S. Ct. 2537, 2542 (2012) (noting that circuit conflict arose "[a]fter certiorari was granted"); *United States* v. *Comstock*, 130 S. Ct. 1949, 1956 (2010) (same); *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010); *United States* v. *Stevens*, 559 U.S. 460 (2010); *United States* v. *Williams*, 553 U.S. 285 (2008); *Gonzales* v. *Carhart*, 550 U.S. 124 (2007); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004); *United States* v. *Morrison*, 529 U.S. 598 (2000); *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995). That practice is consistent with the Court's recognition that judging the constitutionality of an Act of Congress is "the gravest and most delicate duty" of the courts. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275

U.S. 142, 148 (1927) (opinion of Holmes, J.)). And here, the court of appeals has held Section 207 unconstitutional by relying upon nondelegation principles that this Court has not invoked to invalidate an Act of Congress in almost 80 years, and done so in a manner that is inconsistent with this Court's subsequent cases.

Now that the D.C. Circuit has invalidated the method that Congress prescribed for the development of metrics and standards for Amtrak—and notwithstanding the court of appeals' acknowledgment that "no court has invalidated a scheme like" the one at issue here (App., *infra*, 12a)—there will be no further percolation of the question in other courts of appeals. There will instead be a hole in the framework that Congress devised in 2008 for improving passenger-rail service in the United States. This Court's review is accordingly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2014

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5204

ASSOCIATION OF AMERICAN RAILROADS, APPELLANT

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., APPELLEES

Argued: Feb. 19, 2013
Decided: July 2, 2013

OPINION

Before: BROWN, Circuit Judge, and WILLIAMS and SENTELLE, Senior Circuit Judges.

BROWN, Circuit Judge:

Imagine a scenario in which Congress has given to General Motors the power to coauthor, alongside the Department of Transportation, regulations that will govern all automobile manufacturers. And, if the two should happen to disagree on what form those regulations will take, then neither will have the ultimate say.

Instead, an unspecified arbitrator will make the call. Constitutional? The Department of Transportation seems to think so.[1]

Next consider a parallel statutory scheme—the one at issue in this case. This time, instead of General Motors, it is Amtrak (officially, the "National Railroad Passenger Corporation") wielding joint regulatory power with a government agency. This new stipulation further complicates the issue. Unlike General Motors, Amtrak is a curious entity that occupies the twilight between the public and private sectors. And the regulations it codevelops govern not the automotive industry, but the priority freight railroads must give Amtrak's trains over their own. Whether the Constitution permits Congress to delegate such joint regulatory authority to Amtrak is the question that confronts us now.

Section 207 of the Passenger Rail Investment and Improvement Act of 2008 empowers Amtrak and the Federal Railroad Administration (FRA) to jointly develop performance measures to enhance enforcement of the statutory priority Amtrak's passenger rail service has over other trains. The Appellant in this case, the Association of American Railroads (AAR), is a trade association whose members include the largest freight railroads (known in the industry as "Class I" freight railroads), some smaller freight railroads, and

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[1] Counsel for the Appellees embraced precisely this position at oral argument, albeit with some preliminary hemming and hawing. *See* Oral Arg. 30:20-33:00.

—as it happens—Amtrak. Compl. ¶ 10, at 4. Challenging the statutory scheme as unconstitutional, AAR brought suit on behalf of its Class I members against the four Appellees—the Department of Transportation, its Secretary, the FRA, and its Administrator (collectively, the "government"). *Id.* ¶¶ 14-17, at 6-7. We conclude § 207 constitutes an unlawful delegation of regulatory power to a private entity.

I

A

To reinvigorate a national passenger rail system that had, by mid-century, grown moribund and unprofitable, Congress passed the Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327. *See Nat'l R.R. Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 453-54, 105 S. Ct. 1441, 84 L. Ed. 2d 432 (1985). Most prominently, the legislation created the passenger rail corporation now known as Amtrak, which would "employ[] innovative operating and marketing concepts so as to fully develop the potential of modern rail service in meeting the Nation's intercity passenger transportation requirements." Rail Passenger Service Act, § 301, 84 Stat. at 1330. The act also made railroad companies languishing under the prior regime an offer they could not refuse: if these companies consented to certain conditions, such as permitting Amtrak to use their tracks and other facilities, they could shed their cumbersome common carrier obligation to offer intercity passenger service. *See Nat'l R.R. Corp.*, 470 U.S. at 455-56, 105 S. Ct. 1441. Pursuant to statute, Amtrak negotiates these arrangements with individual railroads, the terms of which are

enshrined in Operating Agreements.[2] *See* 49 U.S.C. § 24308(a). Today, freight railroads own roughly 97% of the track over which Amtrak runs its passenger service.

Naturally, sharing tracks can cause coordination problems, which is why Congress has prescribed that, absent an emergency, Amtrak's passenger rail "has preference over freight transportation in using a rail line, junction, or crossing." *Id.* § 24308(c). More recently, this same concern prompted enactment of the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA"), Pub. L. No. 110-432, Div. B, 122 Stat. 4848, 4907. At issue in this case is the PRIIA's § 207, which directs the FRA and Amtrak to "jointly develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services." PRIIA § 207(a), 49 U.S.C. § 24101 (note). If Amtrak and the FRA disagree about the composition of these "metrics and standards," either "may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." *Id.* § 207(d), 49 U.S.C. § 24101 (note). "To the extent practicable," Amtrak and its host rail

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[2] If the parties cannot reach agreement, the Surface Transportation Board (STB) will "order that the facilities be made available and the services provided to Amtrak" and "prescribe reasonable terms and compensation." 49 U.S.C. § 24308(a).

carriers must incorporate the metrics and standards into their Operating Agreements. *Id.* § 207(c), 49 U.S.C. § 24101 (note).

Though § 207 provides the means for devising the metrics and standards, § 213 is the enforcement mechanism. If the "on-time performance" or "service quality" of any intercity passenger train proves inadequate under the metrics and standards for two consecutive quarters, the STB may launch an investigation "to determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators." PRIIA § 213(a), 49 U.S.C. § 24308(f)(1). Similarly, if "Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service" files a complaint, the STB "*shall*" initiate such an investigation. *Id.* (emphasis added). Should the STB determine the failure to satisfy the metrics and standards is "attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation as required," it may award damages or other relief against the offending host rail carrier. *Id.* § 24308(f)(2).

B

Following § 207's mandate, the FRA and Amtrak jointly drafted proposed metrics and standards, which they submitted to public comment on March 13, 2009. *See Metrics and Standards for Intercity Passenger*

Rail Service Under Section 207 of Public Law 110-432, 74 Fed. Reg. 10,983 (Mar. 13, 2009). The proposal attracted criticism, with much vitriol directed at three metrics formulated to measure on-time performance: "effective speed" (the ratio of route's distance to the average time required to travel it), "endpoint on-time performance" (the portion of a route's trains that arrive on schedule), and "all stations on-time performance" (the degree to which trains arrive on time at each station along the route). AAR, among others, derided these metrics as "unrealistic" and worried that certain aspects would create "an excessive administrative and financial burden." The FRA responded to the comments, and a final version of the metrics and standards took effect in May 2010. *See Metrics and Standards for Intercity Passenger Rail Service Under Section 207 of the Passenger Rail Investment and Improvement Act of 2008*, 75 Fed. Reg. 26,839 (May 11, 2010).

AAR filed suit on behalf of its Class I freight railroad members, asking the district court to declare § 207 of the PRIIA unconstitutional and to vacate the promulgated metrics and standards. The complaint asserted two challenges: that § 207 unconstitutionally delegates to Amtrak the authority to regulate other private entities; and that empowering Amtrak to regulate its competitors violates the Fifth Amendment's Due Process Clause. Compl. ¶¶ 47-54, at 16-17. The district court rejected these arguments, granting summary judgment to the government and denying it to AAR. *See AAR v. Dep't of Transp.*, 865 F Supp. 2d 22, 35 (D.D.C. 2012). AAR renews these constitutional claims on appeal.

II

AAR's argument takes the following form: Delegating regulatory authority to a private entity is unconstitutional. Amtrak is a private entity. Ergo, § 207 is unconstitutional. This proposed syllogism is susceptible, however, to attacks on both its validity and soundness. In other words, does the conclusion actually follow from the premises? And, if it does, are both premises true? Our discussion follows the same path.

A

We open our discussion with a principle upon which both sides agree: Federal lawmakers cannot delegate regulatory authority to a private entity. To do so would be "legislative delegation in its most obnoxious form." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311, 56 S. Ct. 855, 80 L. Ed. 1160 (1936). This constitutional prohibition is the lesser-known cousin of the doctrine that Congress cannot delegate its legislative function to an agency of the Executive Branch. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States. ."); *see A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529, 55 S. Ct. 837, 79 L. Ed. 1570 (1935). This latter proposition finds scarce practical application, however, because "no statute can be entirely precise," meaning "some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it." *Mistretta v. United States*, 488 U.S. 361, 415, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989) (Scalia, J., dissenting). All that is required

then to legitimate a delegation to a government agency is for Congress to prescribe an intelligible principle governing the statute's enforcement. *See J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S. Ct. 348, 72 L. Ed. 624 (1928).

Not so, however, in the case of private entities to whom the Constitution commits no executive power. Although objections to delegations are "typically presented in the context of a transfer of legislative authority from the Congress to agencies," we have reaffirmed that "the difficulties sparked by such allocations are even more prevalent in the context of agency delegations to private individuals." *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC ("NARUC")*, 737 F.2d 1095, 1143 (D.C. Cir. 1984) (per curiam).[3] Even an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority. Such entities may, however, help a government agency

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[3] At least one commentator has suggested that the "doctrine forbidding delegation of public power to private groups is, in fact, rooted in a prohibition against self-interested regulation that sounds more in the Due Process Clause than in the separation of powers." A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN To Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 153 (2000). *Carter Coal* offers some textual support for this position, describing the impermissible delegation there as "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment." 298 U.S. at 311, 56 S. Ct. 855. While the distinction evokes scholarly interest, neither party before us makes this point, and our own precedent describes the problem as one of unconstitutional delegation. *See NARUC*, 737 F.2d at 1143 n.41. And, in any event, neither court nor scholar has suggested a change in the label would effect a change in the inquiry.

make its regulatory decisions, for "[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality" that such schemes facilitate. *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 421, 55 S. Ct. 241, 79 L. Ed. 446 (1935). Yet precisely how much involvement may a private entity have in the administrative process before its advisory role trespasses into an unconstitutional delegation? Discerning that line is the task at hand.

Preliminarily, we note the Supreme Court has never approved a regulatory scheme that so drastically empowers a private entity in the way § 207 empowers Amtrak. True, § 207 has a passing resemblance to the humbler statutory frameworks in *Currin v. Wallace*, 306 U.S. 1, 59 S. Ct. 379, 83 L. Ed. 441 (1939), and *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 60 S. Ct. 907, 84 L. Ed. 1263 (1940). In *Currin* Congress circumscribed its delegations of administrative authority—in that case, by requiring two thirds of regulated industry members to approve an agency's new regulations before they took effect. *See* 306 U.S. at 6, 15, 59 S. Ct. 379. *Adkins*, meanwhile, affirmed a modest principle: Congress may formalize the role of private parties in proposing regulations so long as that role is merely "as an aid" to a government agency that retains the discretion to "approve[], disapprove[], or modif[y]" them. 310 U.S. at 388, 60 S. Ct. 907. Like the private parties in *Currin*, Amtrak has an effective veto over regulations developed by the FRA. And like those in *Adkins*, Amtrak has a role in filling the content of regulations. But the similarities end there. The industries in *Currin* did not craft the regulations, while *Adkins* involved no private check on an agency's

regulatory authority.[4] Even more damningly, the agency in *Adkins* could unilaterally change regulations proposed to it by private parties, whereas Amtrak enjoys authority equal to the FRA. Should the FRA prefer an alternative to Amtrak's proposed metrics and standards, § 207 leaves it impotent to choose its version without Amtrak's permission. No case prefigures the unprecedented regulatory powers delegated to Amtrak.[5]

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[4] For what it is worth, *Currin* also involved the collective participation of two thirds of industry members, and the regulations in *Adkins* arose from district boards comprising multiple members of the regulated industry. Neither upheld a statute that favored a single firm over all its market rivals.

[5] The government also cites various decisions from other Circuits that purportedly support its position. All are distinguishable. Several upheld schemes like that in *Currin* in which the effect of regulations was contingent upon the assent of a certain portion of the regulated industry. *See Ky. Div., Horsemen's Benevolent and Protective Ass'n v. Turfway Park Racing Ass'n*, 20 F.3d 1406, 1416 (6th Cir. 1994); *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 759 (9th Cir. 1992). The others resemble *Adkins* insofar as they approve structures in which private industry members serve in purely advisory or ministerial functions. *See Pittston Co. v. United States*, 368 F.3d 385, 394-97 (4th Cir. 2004); *United States v. Frame*, 885 F.2d 1119, 1128-29 (3d Cir. 1989), *abrogated on other grounds by Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S. Ct. 2130, 138 L. Ed. 2d 585 (1997); *Sorrell v. SEC*, 679 F.2d 1323, 1325-26 (9th Cir. 1982); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979); *Todd & Co. v. SEC*, 557 F.2d 1008, 1012-13 (3d Cir. 1977); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952). In none of these cases did a private party stand on equal footing with a government agency.

The government also points out that the metrics and standards themselves impose no liability. Rather, they define the circumstances in which the STB will investigate whether infractions are attributable to a freight railroad's failure to meet its preexisting statutory obligation to accord preference to Amtrak's trains. *See* PRIIA § 213(a), 49 U.S.C. § 24308(f). We are not entirely certain what to make of this argument. Taken to its logical extreme, it would preclude all preenforcement review of agency rulemaking, so it is probably unlikely the government is pressing so immodest a claim.[6] If the point is merely that the STB adds another layer of government "oversight" to Amtrak's exercise of regulatory power, this precaution does not alter the analysis. Government enforcement power did not save the rulemaking authority of the private coal companies in *Carter Coal*, nor the power of

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[6] AAR's Reply Brief treated this argument as an ordinary ripeness challenge. *See* Br. 18-21. If that is what the government intended, then we are not persuaded. As a purely legal question, § 207's constitutionality is appropriate for immediate judicial resolution. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977). And depriving AAR of review at this stage would result in considerable hardship. *See United Christian Scientists v. Christian Sci. Bd. of Dirs., First Church of Christ, Scientist*, 829 F.2d 1152, 1160 n.29 (D.C. Cir. 1987). The record is replete with affidavits from the freight railroads describing the immediate actions the metrics and standards have forced them to take. *See* Decl. of Paul E. Ladue ¶¶ 6-9, at 3-5; Decl. of Mark M. Owens ¶ 9, at 4; Decl. of Virginia Marie Beck ¶¶ 9-11, at 4-6; Decl. of Peggy Harris ¶¶ 8-14, at 3-5.

private landowners in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210 (1928), to impose a zoning restriction on a neighbor's tract of land. As is often the case in administrative law, the metrics and standards lend definite regulatory force to an otherwise broad statutory mandate. *See, e.g., Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001). The preference for Amtrak's traffic may predate the PRIIA, but the metrics and standards are what channel its enforcement. Certainly the FRA and Amtrak saw things that way, responding to one public comment by noting the STB "is the primary enforcement body *of the standards.*" J.A. 63 (emphasis added). Not only that, § 207 directs "Amtrak and its host carriers" to include the metrics and standards in their Operating Agreements "[t]o the extent practicable." PRIIA § 207(c), 49 U.S.C. § 24101 (note). The STB's involvement is no safe harbor from AAR's constitutional challenge to § 207.

As far as we know, no court has invalidated a scheme like § 207's, but perhaps that is because no parallel exists. Unprecedented constitutional questions, after all, lack clear and controlling precedent. We nevertheless believe *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, — U.S. —, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010), offers guidance. There the Supreme Court deemed it a violation of separation of powers to endow inferior officers with two layers of good-cause tenure insulating them from removal by the President. *See id.* at 3164. Two principles from that case are particularly resonant. To begin with, just because two structural features raise no

constitutional concerns independently does not mean Congress may combine them in a single statute. *Free Enterprise Fund* deemed invalid a regime blending two limitations on the President's removal power that, taken separately, were unproblematic: the establishment of independent agencies headed by principal officers shielded from dismissal without cause, *see Humphrey's Ex'r v. United States*, 295 U.S. 602, 629-31, 55 S. Ct. 869, 79 L. Ed. 1611 (1935), and the protection of certain inferior officers from removal by principal officers directly accountable to the President, *see Morrison v. Olson*, 487 U.S. 654, 691-93, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988). *See* 130 S. Ct. at 3146-47. So even if the government is right that § 207 merely synthesizes elements approved by *Currin* and *Adkins*, that would be no proof of constitutionality.

As for the second principle, *Free Enterprise Fund* also clarifies that novelty may, in certain circumstances, signal unconstitutionality. That double good-cause tenure, for example, lacked an antecedent in the history of the administrative state was one reason to suspect its legality:

> "Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity. Neither the majority opinion nor the PCAOB nor the United States as intervenor has located any historical analogues for this novel structure. They have not identified any independent agency other than the PCAOB that is appointed by and removable only for cause by another independent agency."

Id. at 3159 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)); *accord Nat'l Fed'n of Indep. Bus. v. Sebelius*, — U.S. —, 132 S. Ct. 2566, 2586, 183 L. Ed. 2d 450 (2012). In defending § 207, the government revealingly cites no case—nor have we found any—embracing the position that a private entity may jointly exercise regulatory power on equal footing with an administrative agency. This fact is not trivial. Section 207 is as close to the blatantly unconstitutional scheme in *Carter Coal* as we have seen. The government would essentially limit *Carter Coal* to its facts, arguing that "[n]o more is constitutionally required" than the government's "active oversight, participation, and assent" in its private partner's rulemaking decisions. Appellee's Br. 19. This proposition—one we find nowhere in the case law—vitiates the principle that private parties must be limited to an advisory or subordinate role in the regulatory process.

To make matters worse, § 207 fails to meet even the government's ad hoc standard. Consider what would have happened if Amtrak and the FRA could not have reached an agreement on the content of the metrics and standards within 180 days of the PRIIA's enactment. Amtrak could have "petition[ed] the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." PRIIA 207(d), 49 U.S.C. § 24101 (note). And nothing in the statute precludes the appointment

of a private party as arbitrator.[7] That means it would have been entirely possible for metrics and standards to go into effect that had not been assented to by a single representative of the government. Though that did not in fact occur here, § 207's arbitration provision still polluted the rulemaking process over and above the other defects besetting the statute. As a formal matter, that the recipients of illicitly delegated authority opted not to make use of it is no antidote. It is *Congress's* decision to delegate that is unconstitutional. *See Whitman*, 531 U.S. at 473, 121 S. Ct. 903. As a practical matter, the FRA's failure to reach an agreement with Amtrak would have meant forfeiting regulatory power to an arbitrator the agency would have had no hand in picking. Rather than ensuring Amtrak would "function subordinately" to the FRA, *Adkins*, 310 U.S. at 399, 60 S. Ct. 907, this backdrop stacked the deck in favor of compromise. Even for government agencies, half an apple is better than none at all.

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[7] The government notes § 207's arbitration provision does not *require* the arbitrator be a private party. This is irrelevant. "[A]n agency can[not] cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute." *Whitman*, 531 U.S. at 472, 121 S. Ct. 903. Nor does the canon of constitutional avoidance offer a solution. The statute's text precludes the government's suggestion that we construe the open-ended language "an arbitrator" to include only federal entities. The constitutional avoidance canon is an interpretive aid, not an invitation to rewrite statutes to satisfy constitutional strictures. *Reno v. ACLU*, 521 U.S. 844, 884-85, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).

We remain mindful that the Constitution "contemplates that practice will integrate the dispersed powers into a workable government." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S. Ct. 863, 96 L. Ed. 1153 (1952) (Jackson, J., concurring). But a flexible Constitution must not be so yielding as to become twisted. Unless it can be established that Amtrak is an organ of the government, therefore, § 207 is an unconstitutional delegation of regulatory power to a private party.

B

Now the crucial question: is Amtrak indeed a private corporation? If not—if it is just one more government agency—then the regulatory power it wields under § 207 is of no constitutional moment.

Many of the details of Amtrak's makeup support the government's position that it is not a private entity of the sort described in *Carter Coal*. Amtrak's Board of Directors includes the Secretary of Transportation (or his designee), seven other presidential appointees, and the President of Amtrak. *See* 49 U.S.C. § 24302(a). The President of Amtrak—the one Board member not appointed by the President of the United States—is in turn selected by the eight other members of the Board. *See id.* § 24303(a). Amtrak is also subject to the Freedom of Information Act. *See id.* § 24301(e). Amtrak's equity structure is similarly suggestive. As of September 30, 2011, four common stockholders owned 9,385,694 outstanding shares, which they acquired from the four railroads whose intercity passenger service Amtrak assumed in 1971. BDO USA, LLP, NATIONAL RAILROAD PASSENGER CORPORATION

AND SUBSIDIARIES (AMTRAK) CONSOLIDATED FINANCIAL STATEMENTS: YEARS ENDED SEPTEMBER 30, 2011 AND 2010, at 18 (2011) (J.A. 351). At the same time, however, the federal government owned all 109,396,994 shares of Amtrak's preferred stock, each share of which is convertible into 10 shares of common stock. *Id.* at 17 (J.A. 350). And, all that stands between Amtrak and financial ruin is congressional largesse. *See id.* at 6 (J.A. 339).

That being said, Amtrak's legislative origins are not determinative of its constitutional status. Congress's power to charter private corporations was recognized early in our nation's history. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 409, 4 L. Ed. 579 (1819). And, as far as Congress was concerned, that is exactly what it was doing when it created Amtrak. As Congress explained it, Amtrak "shall be operated and managed as a for-profit corporation" and "is not a department, agency, or instrumentality of the United States Government." 49 U.S.C. § 24301(a). We have previously taken Congress at its word and relied on this declaration in deciding whether the False Claims Act applies to Amtrak. *See United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 490 (D.C. Cir. 2004) ("Amtrak is not the Government."); *id.* at 491 ("Amtrak is Not the Government."); *id.* at 502 ("Amtrak is not the Government."). Amtrak agrees: "The National Railroad Passenger Corporation, also known as Amtrak, is not a government agency or establishment [but] a private corporation operated for profit." NAT'L R.R. PASSENGER CORP., FREEDOM OF INFORMATION ACT HANDBOOK 1 (2008). And, some-

what tellingly, Amtrak's website is www.amtrak.com—not www.amtrak.gov.

How to decide? Since, in support of its claim that Amtrak is a public entity, the government looks past labels to how the corporation functions, it is worth examining what functional purposes the public-private distinction serves when it comes to delegating regulatory power. We identify two of particular importance. First, delegating the government's powers to private parties saps our political system of democratic accountability. *See Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 34 (D.C. Cir. 2008) (Brown, J., dissenting in part). This threat is particularly dangerous where both Congress and the Executive can deflect blame for unpopular policies by attributing them to the choices of a private entity. *See NARUC*, 737 F.2d at 1143 n.41; *cf. New York v. United States*, 505 U.S. 144, 169, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."). This worry is certainly present in the case of § 207, since Congress has expressly forsworn Amtrak's status as a "department, agency, or instrumentality of the United States Government." 49 U.S.C. § 24301(a)(3). Dislike the metrics and standards Amtrak has concocted? It's not the federal government's fault—Amtrak is a "for-profit corporation." *Id.* § 24301(a)(2).

Second, fundamental to the public-private distinction in the delegation of regulatory authority is the belief that disinterested government agencies ostensibly look to the public good, not private gain. For this reason, delegations to private entities are particularly perilous. *Carter Coal* specifically condemned delegations made not "to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." 298 U.S. at 311, 56 S. Ct. 855. Partly echoing the Constitution's guarantee of due process, this principle ensures that regulations are not dictated by those who "are not bound by any official duty," but may instead act "for selfish reasons or arbitrarily." *Roberge*, 278 U.S. at 122, 49 S. Ct. 50. More recent decisions are also consistent with this view. *See Pittston Co.*, 368 F.3d at 398; *NARUC*, 737 F.2d at 1143-44; *Sierra Club v. Sigler*, 695 F.2d 957, 962 n.3 (5th Cir. 1983). Amtrak may not compete with the freight railroads for customers, but it does compete with them for use of their scarce track. Like the "power conferred upon the majority to regulate the affairs of an unwilling minority" in *Carter Coal*, § 207 grants Amtrak a distinct competitive advantage: a hand in limiting the freight railroads' exercise of their property rights over an essential resource. 298 U.S. at 311, 56 S. Ct. 855.

Because Amtrak must "be operated and managed as a for-profit corporation," 49 U.S.C. § 24301(a)(2), the fact that the President has appointed the bulk of its Board does nothing to exonerate its management from its fiduciary duty to maximize company profits. Also consistent with this purpose, "Amtrak is encour-

aged to make agreements with the private sector and undertake initiatives that are consistent with good business judgment and designed to maximize its revenues and minimize Government subsidies." *Id.* § 24101(d). Yet § 207 directs Amtrak and its host carriers to incorporate the metrics and standards in their Operating Agreements. *See id.* § 24101(c) note. So to summarize: Amtrak must negotiate contracts that will maximize its profits; those contracts generally must, by law, include certain terms; and Amtrak has the power to define those terms. Perverse incentives abound. Nothing about the government's involvement in Amtrak's operations restrains the corporation from devising metrics and standards that inure to its own financial benefit rather than the common good. And that is the very essence of the public-private distinction when a claim of unconstitutional delegation arises.

No discussion of Amtrak's status as a private or public institution would be complete, however, without an examination of the Supreme Court's decision in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995).[8] There the Court held that Amtrak "is part of the Government for purposes of the First Amendment." *Id.* at 400, 115 S. Ct. 961. Otherwise, the majority cau-

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[8] Strangely, the government's brief places almost no emphasis on *Lebron*. Perhaps this indicates the government's agreement with AAR's reading of the case. Whatever the reason for this near-silence, we think it important to address the Supreme Court's most explicit discussion of Amtrak's status.

tioned, the government could "evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Id.* at 397, 115 S. Ct. 961. What the Court did not do in *Lebron* was conclude that Amtrak counted as part of the government for all purposes. On some questions—Does the Administrative Procedure Act apply to Amtrak? Does Amtrak enjoy sovereign immunity from suit?—Congress's disclaimer of Amtrak's governmental status is dispositive. *See id.* at 392, 115 S. Ct. 961; *Totten*, 380 F.3d at 491-92. This makes sense: Congress has the power to waive certain governmental privileges, like sovereign immunity, that are within its legislative control; but it cannot circumvent the Bill of Rights by simply dubbing something private.

Whether § 207 effects an unconstitutional delegation is a constitutional question, not a statutory one. But just because *Lebron* treated Amtrak as a government agency for purposes of the First Amendment does not dictate the same result with respect to all other constitutional provisions. To view *Lebron* in this way entirely misses the point. In *Lebron*, viewing Amtrak as a strictly private entity would have permitted the government to avoid a constitutional prohibition; in this case, deeming Amtrak to be just another governmental entity would allow the government to ignore a constitutional obligation. Just as it is impermissible for Congress to employ the corporate form to sidestep the First Amendment, neither may it reap the benefits of delegating regulatory authority while absolving the federal government of all responsibility for its exercise. The federal government cannot have its cake and eat it too. In any event, *Lebron's* holding

was comparatively narrow, deciding only that Amtrak is an agency of the United States for the purpose of the First Amendment. 513 U.S. at 394, 115 S. Ct. 961. It did not opine on Amtrak's status with respect to the federal government's structural powers under the Constitution—the issue here.

This distinction is more than academic. When *Lebron* contrasted "the constitutional obligations of Government" from "the 'privileges of the government,'" it was not drawing a distinction between questions that are constitutional from those that are not. Any "privilege" of the federal government must also be anchored in the Constitution. *Id.* at 399, 115 S. Ct. 961. As our federal government is one of enumerated powers, the Constitution's structural provisions are the source of Congress's power to act in the first place. *See United States v. Lopez*, 514 U.S. 549, 552, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995); THE FEDERALIST No. 45 (James Madison). And, generally speaking, these provisions authorize action without mandating it. Congress's power to regulate interstate commerce, for example, does not dictate the enactment of this or that bill within its proper scope. By contrast, individual rights are "affirmative prohibitions" on government action that become relevant "only where the Government possesses authority to act in the first place." *Nat'l Fed'n of Ind. Bus.*, 132 S. Ct. at 2577. While often phrased in terms of an affirmative prohibition, Congress's inability to delegate government power to private entities is really just a function of its constitutional authority not extending that far in the first place. In other words, rather than proscribing what Congress *cannot* do, the doctrine defines the limits of

what Congress *can* do. And, by designing Amtrak to operate as a private corporation—to seek profit on behalf of private interests—Congress has elected to deny itself the power to delegate it regulatory authority under § 207. *Cf.* Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to bb-4 (requiring, beyond what the Constitution mandates, that the federal government "not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the restriction satisfies strict scrutiny).

We therefore hold that Amtrak is a private corporation with respect to Congress's power to delegate regulatory authority. Though the federal government's involvement in Amtrak is considerable, Congress has both designated it a private corporation and instructed that it be managed so as to maximize profit. In deciding Amtrak's status for purposes of congressional delegations, these declarations are dispositive. Skewed incentives are precisely the danger forestalled by restricting delegations to government instrumentalities. And as a private entity, Amtrak cannot be granted the regulatory power prescribed in § 207.

III

We conclude § 207 of the PRIIA impermissibly delegates regulatory authority to Amtrak. We need not reach AAR's separate argument that Amtrak's involvement in developing the metrics and standards deprived its members of due process. Accordingly, the judgment of the district court is

Reversed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 11-1499 (JEB)

ASSOCIATION OF AMERICAN RAILROADS, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., FEFENDANTS

MEMORANDUM OPINION

JAMES E. BOASBERG, District Judge.

We all know Amtrak—the federally chartered corporation that has provided intercity and commuter train service to Americans for more than forty years. But what *is* Amtrak? Is it a private entity? Or is it part of the government? While courts have previously addressed these questions in various other contexts, it is on their resolution that much of this case hinges.

Section 207 of The Passenger Railroad Investment and Improvement Act of 2008 (PRIIA) requires the Federal Railroad Administration (FRA) and Amtrak to "jointly" develop standards to evaluate the performance of Amtrak's intercity passenger trains. Con-

sistent with this mandate, the FRA and Amtrak issued Metrics and Standards for measuring Amtrak's on-time performance and minutes of delay. In this suit, Plaintiff Association of American Railroads (AAR)—an organization whose members include freight railroads that own tracks and facilities on and through which Amtrak's trains operate—contends that § 207 both unconstitutionally delegates rulemaking authority to a private entity and violates its members' due-process rights. Each side has now moved for summary judgment.

The Court concludes that the statute survives both of Plaintiff's constitutional challenges. Because the Supreme Court has held that Amtrak is to be considered a governmental entity for the purpose of constitutional individual-rights claims, Plaintiff's due-process challenge, which is premised on Amtrak's status as an interested private party, cannot prevail. The non-delegation claim, however, poses a closer question. Ultimately, though, the Court need not decide whether Amtrak should be considered a governmental entity or a private party for purposes of that issue. Even if Amtrak is a private entity, the government is sufficiently involved as to render § 207's delegation constitutional. The Court, therefore, will grant Defendants' Motion for Summary Judgment and deny Plaintiff's.

I. Background

By the middle of the twentieth century, the once-robust intercity passenger-train industry had fallen on hard times. Formerly the primary means of intercity

travel, the railroads faced crippling competition from the burgeoning air-travel industry and the new interstate highway system. *See* Def.'s Mot. & Opp., Exh. 1 (Congressional Budget Office, "The Past and Future of U.S. Passenger Rail Service" (Sept. 2003)) at 5-7. In an attempt "to avert the threatened extinction of passenger trains in the United States," *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 383, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995), Congress passed the Rail Passenger Service Act of 1970, 84 Stat. 1327, 45 U.S.C. § 501 *et seq.* Among other things, the Act established the National Railroad Passenger Corporation, better known as Amtrak. *See id.* § 401(a) (codified at 45 U.S.C. §§ 561-66) (repealed and incorporated in sections of 49 U.S.C. subtit. V, part C).

Amtrak, which was set up to function as a "private, for-profit corporation," 49 U.S.C. § 24301(a), began operation in May 1971. *See Nat'l R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Corp.*, 470 U.S. 451, 454, 105 S. Ct. 1441, 84 L. Ed. 2d 432 (1985). Then, as now, Amtrak's passenger trains ran primarily on tracks owned by freight railroads. *See* Pl.'s Mot., Decl. of Thomas Dupree, Exh. H (AAR Comment on Proposed Metrics and Standards) at 2; *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 410, 112 S. Ct. 1394, 118 L. Ed. 2d 52 (1992) ("Most of Amtrak's passenger trains run over existing track systems owned and used by freight railroads."). To ensure the continued vitality of passenger rail service, accordingly, Congress obligated the freight railroads to lease their tracks and facilities to Amtrak. *See* 49 U.S.C. § 24308(a). Congress also provided that

Amtrak's intercity passenger trains would generally take "preference over freight transportation in using a rail line, junction, or crossing." *Id.* § 24308(c). Consistent with these statutory mandates, the freight railroads entered into contracts with Amtrak—commonly known as operating agreements—that set out the rates Amtrak pays in exchange for use of the railroads' tracks. *See* Pl.'s Mot, Decl. of Paul LaDue, ¶ 12; Pl.'s Mot., Decl. of Virginia Beck, ¶ 13; Pl.'s Mot., Decl. of Mark Owens, ¶ 12; Pl.'s Mot., Decl. of Peggy Harris, ¶ 12; *see also* Dupree Decl., Exh. G (Report of the Inspector General, U.S. Dep't of Transp., "Amtrak Cascades and Coast Starlight Routes" (Sept. 23, 2010)) at 29.

Although Congress has specified that Amtrak "is not a department, agency, or instrumentality of the United States Government," 49 U.S.C. § 24301(a), the government remains heavily involved in its operations. Of the nine directors who sit on Amtrak's board, eight are directly appointed by the President, with the advice and consent of the Senate. *See* 49 U.S.C. § 24302. The ninth board member is selected by the other eight. *Id.* Amtrak is required to submit annual reports to Congress and the President, *see id.* §§ 24315(a)-(b), and the government owns more than 90% of Amtrak's stock. *See* Def.'s Mot., Exh. 2 (Nat'l R.R. Pass. Corp. and Sub., Consolidated Financial Statements for the Years Ended Sept. 30, 2011 and 2010 (Dec. 2011)) at 17-18. Because Amtrak has never managed to become self-sufficient, moreover, the corporation depends on substantial federal subsidies to continue its operations. *See id.* at 6; Dupree Decl.,

Exh. Q (Katherine Shaver, "At 40, Amtrak Struggles to Stay Up to Speed," *Wash. Post* (May 15, 2011)) at C1.

The statute that is the subject of this suit, The Passenger Railroad Investment and Improvement Act of 2008 (PRIIA), Pub. L. No. 11-432, is the latest of several pieces of legislation intended to improve Amtrak's financial health and the quality of its service. At issue is § 207 of that Act, which provides, in relevant part:

> [T]he Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including [, *inter alia*,] on-time performance and minutes of delay.

PRIIA, § 207(a) (codified at 49 U.S.C. § 24101, note). The statute provides further details about what those Metrics and Standards should include, and it states that, "[t]o the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards developed under subsection (a) into their access and service agreements." *Id.* § 207(c).

In addition, § 213(a) of the PRIIA empowers the Surface Transportation Board (STB), "a quasi-independent

three-member body within the Department of Transportation," *Iowa, Chicago & Eastern R.R. Corp. v. Washington Cnty., Iowa*, 384 F.3d 557, 558-59 (8th Cir. 2004), to initiate an investigation if Amtrak fails to meet the on-time performance standards laid out in the Metrics and Standards. *See* PRIIA § 213(a) (codified at 49 U.S.C. § 24308(f)). If the STB concludes that "delays or failures to achieve minimum standards . are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation," as required by 49 U.S.C. § 24308(c), "the Board may award damages against the host rail carrier." *Id.* § 213(a). If "appropriate," furthermore, the STB may order that those damages be remitted to Amtrak. *See id.*

Consistent with § 207's mandate, the FRA and Amtrak issued proposed Metrics and Standards on March 13, 2009, *see* Dupree Decl., Exh. B (Proposed Metrics and Standards for Intercity Passenger Rail Service (Mar. 13, 2009)), accepted comments from interested parties, *see* 74 Fed. Reg. 10983 (Mar. 13, 2009), and ultimately published the final version of the Metrics and Standards on May 6, 2010. *See* Dupree Decl., Exh. D (Final Metrics and Standards for Intercity Passenger Rail Service, Docket No. FRA-2009-0016 (May 6, 2010)). The Metrics and Standards provide that Amtrak's on-time performance is to be assessed on a route-by-route basis by reference to three separate metrics. *See id.* at 24-30. In general terms, these metrics address "effective speed," which is the route's distance divided by the average time it takes to traverse it, "endpoint ontime performance," which

measures how often trains arrive on time at the end of the route, and "all-stations on-time performance," which measures how often trains arrive on time at each station along the route. *See id.* The Metrics and Standards also set limits on permissible delays, capping the delays for which a host railroad may be responsible at 900 minutes per 10,000 route miles. *See id.* at 27-28.

These Metrics and Standards went into effect on May 12, 2010. *See id.* at 1. Since then, the freight railroads have already made efforts to achieve the goals set forth therein. *See* LaDue Decl., ¶¶ 5-11; Beck Decl., ¶ 11; Owens Decl., ¶ 9; Harris Decl., ¶¶ 8-10. The FRA's quarterly reports have, nevertheless, consistently concluded that the Metrics and Standards are not being met on many of Amtrak's routes. *See generally* Dupree Decl., Exhs. M-P (FRA's February, April, July, and September 2011 Quarterly Reports); LaDue Decl., ¶ 5; Beck Decl., ¶ 8; Owens Decl., ¶ 7; Harris Decl., ¶ 7. While neither party has presented evidence that freight railroads have yet been fined as a result of these shortcomings, at least one petition has been filed by Amtrak against a railroad based on its alleged failure to meet the requirements of the Metrics and Standards. *See generally* Pl.'s Opp. & Reply, Decl. of Porter Wilkinson, Exh. A (Petition for Relief by Amtrak, Docket No. NOR 42134).

Plaintiff in this case, the Association of American Railroads (AAR), "is a nonprofit trade association whose members include all of the Class I freight railroads (the largest freight railroads), as well as some

smaller freight railroads and Amtrak." Compl., ¶ 10. It brings this case on behalf of its Class I-member freight railroads, all of which own tracks on which Amtrak trains are operated. *See id.*, ¶¶ 10-11. Because they are required to incorporate the Metrics and Standards into their operating agreements where "practicable" and because they could be subject to penalties if Amtrak's failure to live up to those standards is found to have been caused by their failure to prioritize Amtrak trains, AAR maintains that these railroads are directly harmed by § 207 of the PRIIA and the Metrics and Standards promulgated in accordance therewith. *See id.*, ¶¶ 11-13. In the instant suit, AAR claims that § 207 of the PRIIA, which empowers the FRA and Amtrak to "jointly" develop Metrics and Standards, violates the constitution in two ways. *See id.*, ¶¶ 47-54. Both sides now seek summary judgment.

II. Legal Standard

Summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). A fact is "material" if it is capable of affecting the substantive outcome of the litigation. *Holcomb*, 433 F.3d at 895; *Liberty Lobby, Inc.*, 477 U.S. at 248, 106 S. Ct. 2505. A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Scott v. Harris*, 550 U.S. 372, 380,

127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007); *Liberty Lobby, Inc.*, 477 U.S. at 248, 106 S. Ct. 2505; *Holcomb*, 433 F.3d at 895. "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular parts of materials in the record." Fed R. Civ. P. 56(c)(1)(A).

The party seeking summary judgment "bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987). When a motion for summary judgment is under consideration, "the evidence of the non-movant[s] is to be believed, and all justifiable inferences are to be drawn in [her] favor." *Liberty Lobby, Inc.*, 477 U.S. at 255, 106 S. Ct. 2505; *see also Mastro v. PEPCO*, 447 F.3d 843, 850 (D.C. Cir. 2006); *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1288 (D.C. Cir. 1998) (*en banc*). On a motion for summary judgment, the Court must "eschew making credibility determinations or weighing the evidence." *Czekalski v. Peters*, 475 F.3d 360, 363 (D.C. Cir. 2007).

The nonmoving party's opposition, however, must consist of more than mere unsupported allegations or denials and must be supported by affidavits, declarations, or other competent evidence, setting forth specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The nonmovant is required to provide evidence that would permit a reasonable jury to find in its favor. *Laningham v. United States Navy*, 813 F.2d 1236, 1242 (D.C. Cir. 1987). If the nonmovant's evi-

dence is "merely colorable" or "not significantly probative," summary judgment may be granted. *Liberty Lobby, Inc.*, 477 U.S. at 249-50, 106 S. Ct. 2505.

III. Analysis

This case presents two constitutional challenges to § 207 of the PRIIA. But before discussing these, the Court preliminarily notes that AAR, as a representative of the freight railroads that have operating agreements with Amtrak, has established—and Defendant has not challenged—its standing to bring them. *See, e.g., Lee's Summit v. Surface Transp. Bd.*, 231 F.3d 39, 41 (D.C. Cir. 2000) (courts must ensure plaintiff has constitutional standing, "*sua sponte* if need be"). The freight railroads own tracks on which Amtrak trains are operated, and they are required by statute to incorporate the Metrics and Standards into their operating agreements where "practicable." PRIIA, § 207(c). If Amtrak's trains fail to achieve the goals set out in the Metrics and Standards, moreover, the freight railroads can be penalized. *See id.*, § 213(a). Representatives of the railroads have attested that the Metrics and Standards currently affect their business operations. *See* La-Due Decl., ¶¶ 5-11; Beck Decl., ¶ 11; Owens Decl., ¶ 9; Harris Decl., ¶¶ 8-10. Plaintiff has shown, accordingly, that its members have been injured by the Metrics and Standards promulgated under § 207 and that such injury would be redressed by the relief it seeks. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (reciting the three elements of constitutional standing: injury, causation, and injury); *Friends of the Earth, Inc. v. Laidlaw Environ-*

mental Servs., Inc., 528 U.S. 167, 181, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (organization has standing to bring suit on its members' behalf when members would otherwise have standing, interests at stake are related to organization's purpose, and member participation unnecessary). As there appear to be no other jurisdictional or procedural barriers to the resolution of Plaintiff's claims, the Court will proceed directly to these challenges.

AAR first contends that § 207 "violates the nondelegation doctrine and the separation of powers principle" by delegating legislative power to Amtrak, a private entity. See Compl., ¶ 51. Second, it argues that § 207 violates the Due Process Clause of the Fifth Amendment by "empower[ing] Amtrak," an "interested private part[y]," "to wield legislative and rulemaking power to enhance its commercial position at the expense of other industry participants." *Id.*, ¶¶ 53-54. Although these claims are brought under two different provisions of the Constitution, both involve the same alleged flaw in the statute: the delegation of rulemaking authority to Amtrak. Both, furthermore, are premised upon Amtrak's status as a private entity. Whether Amtrak, a federally chartered corporation, should in fact be considered a private entity for purposes of Plaintiff's constitutional claims is thus the necessary jumping-off point.

Because the answer to that question is clearer (and, indeed, decisive) with respect to the due-process claim, the Court will begin there. Concluding that Amtrak is a governmental entity for purposes of constitutional individual-rights claims and that AAR's due-process

claim falls neatly within that category, the Court will on that ground grant Defendants' Motion with respect to that issue. Turning to the nondelegation claim, though, Amtrak's status as a governmental or private entity is less clear. Fortunately, however, the Court need not resolve that question. Instead, it finds that, even if Amtrak is a private entity, § 207's delegation survives AAR's nondelegation challenge because the government retains control over the promulgation of the Metrics and Standards. The Court will thus grant Defendants' Motion with respect to that claim as well.

A. *Due Process Claim*

The Fifth Amendment's Due Process Clause prohibits interested private parties from wielding regulatory authority. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311, 56 S. Ct. 855, 80 L. Ed. 1160 (1936) (holding that "the power to regulate the business of another, and especially of a competitor," is "a denial of rights safeguarded by the due process clause"); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987) ("potential for private interest to influence the discharge of public duty" violates due process); *Gibson v. Berryhill*, 411 U.S. 564, 578-79, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973) (due process violated when governmental authority exercised by parties with "substantial pecuniary interest in legal proceedings"). Amtrak, AAR argues, is a private entity that competes for commercial position with the freight railroads. Because PRIIA endows Amtrak with rulemaking authority, AAR maintains that the statute contaminates the reg-

ulatory process with the potential for bias and, accordingly, violates its members' due-process rights.

AAR's contention that § 207 violates its members' due-process rights thus assumes that Amtrak is a private entity. *See* Compl., ¶¶ 53-54. In light of Congress's clear statement that Amtrak "shall be operated and managed as a for-profit corporation" and "is not a department, agency, or instrumentality of the United States Government," 49 U.S.C. § 24301(a)(3), that assumption is certainly not baseless. Indeed, the D.C. Circuit has previously held that "Amtrak is not the Government" in the context of a False Claims Act claim. See *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 490 (D.C. Cir. 2004).

In *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995), however, the Supreme Court addressed Amtrak's status as a governmental or private entity in the context of a First Amendment claim. The Court stated that Congress's statements that Amtrak is not the government are "assuredly dispositive of Amtrak's status for purposes of matters that are within Congress's control—for example, whether it is subject to statutes that impose obligations or confer powers upon Government entities, such as the Administrative Procedure Act." *Id.* at 392, 115 S. Ct. 961 (citing 45 U.S.C, § 541 (repealed, revised, and incorporated at 49 U.S.C. § 24301(a))). For purposes of matters that are outside of Congress's control, however, the Court emphasized that "it is not for Congress to make the final determination of Amtrak's status as a Government entity. ." *Id.* "If Amtrak is, by

its very nature, what the Constitution regards as the Government, congressional pronouncement that it is not such can no more relieve it of its First Amendment restrictions than a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment." *Id.* "It surely cannot be," the Court stressed, "that government is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Id.* at 396, 115 S. Ct. 961.

The Court, therefore, undertook a functional analysis to determine whether Amtrak should be considered a governmental entity in the context of the constitutional claim presented in that case. *See id.* at 393-400, 115 S. Ct. 961. Noting that Amtrak "was created explicitly for the furtherance of federal governmental goals" and that "six of the corporation's eight externally named directors . are appointed directly by the President," *id.* at 397-98, 115 S. Ct. 961, the Court found that the government exercises permanent control over Amtrak not merely "as a creditor[,] but as a policy maker." *Id.* at 399, 115 S. Ct. 961. It held, accordingly, that Amtrak "is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." *Id.* at 394, 115 S. Ct. 961.

This discussion in *Lebron* plainly dictates the outcome of AAR's due-process claim, which falls squarely in the category of constitutional individual-rights claims. *See, e.g., J. McIntyre Mach., Ltd. v. Nicastro,* — U.S. —, 131 S. Ct. 2780, 2786, 180 L. Ed. 2d 765 (2011) ("The Due Process Clause protects an individu-

al's right to be deprived of life, liberty, or property only by the exercise of lawful power.") (plurality opinion). The two hallmarks of government control that the *Lebron* Court found decisive—namely, that Amtrak was created by special law for the furtherance of governmental objectives and that the government retained the authority to appoint a majority of directors —moreover, have not changed. Indeed, when *Lebron* was decided, the President appointed only six of Amtrak's nine directors, *see Lebron*, 513 U.S. at 397, 115 S. Ct. 961; he now appoints eight of the nine. *See* 49 U.S.C. § 24302(a). The government, moreover, retains more than 90% of Amtrak's stock, *see* Consolidated Financial Statements at 17-18, appropriates for Amtrak more than a billion dollars annually, see PRIIA, § 101, and sets salary limits for Amtrak's employees. *See* 49 U.S.C. § 24303(b). In addition, Amtrak is required to submit annual reports to Congress and the President. *See id.* §§ 24315(a)-(b); *cf. Rocap v. Indiek*, 539 F.2d 174, 180 n.12 (D.C. Cir. 1976) (considering need to report to Congress as an indicator of federal control for purpose of determining FDIC's governmental status under a federal statute).

AAR's attempts to distinguish *Lebron* fall short of their mark. Plaintiff, for example, stresses that Congress removed Amtrak from the list of mixed-ownership government corporations after *Lebron* was decided. *See* Pl.'s Mot. at 27-28 (citing Pub. L. No. 105-134, § 415(2)). The inference it would have the Court draw, it seems, is that this changed circumstance should affect the outcome. The Supreme Court, however, clearly stated that Congress's *ipse*

dixit cannot change Amtrak's nature for purposes of constitutional individual-rights claims. *See Lebron*, 513 U.S. at 392, 396, 115 S. Ct. 961. Just as Congress's plain statement that Amtrak should be regarded as a private corporation does not make it such in the eyes of the Constitution, *see id.* at 392, 115 S. Ct. 961, its removal of Amtrak's name from a list of mixed-ownership corporations, *a fortiori*, similarly does not alter its nature. It was the still-unchanged facts that Amtrak was created "by special law for the furtherance of governmental objectives" and that the government "retains for itself permanent authority to appoint a majority of [its] directors"—not the presence of Amtrak's name on a statutory list—moreover, that were decisive in *Lebron*. *See id.* at 400, 115 S. Ct. 961. And while AAR is correct that Amtrak has some private shareholders, that was the case at the time *Lebron* was decided and did not alter its analysis.

In addition, even if Plaintiff is right that Amtrak is a private entity *for purposes of PRIIA*, which it argues was intended "to boost the bottom-line of a for-profit corporation," Pl.'s Mot. at 28, that does not change its status *for purposes of the Constitution*. *See Lebron*, 513 U.S. at 392, 115 S. Ct. 961 (concluding that Congress can determine Amtrak's status for the purpose of "matters that are within Congress's control," like other federal statutes, but not for matters outside its control, like the Constitution); *see also Totten*, 380 F.3d at 492 (concluding Amtrak is the government for purposes of the False Claims Act because "False Claims Act coverage is a matter within Congress's control"). Again, Congress can only deter-

mine Amtrak's status for the purpose of issues it has the power to control. *See Lebron*, 513 U.S. at 392, 115 S. Ct. 961. Because AAR contends that PRIIA violates the *Constitution*—not that Amtrak or any other entity violated PRIIA—it is, of course, Amtrak's status for purposes of constitutional individual-rights claims, not PRIIA claims, that controls.

As Plaintiff emphasizes, furthermore, "[T]he *Lebron* Court explained that while Amtrak is part of the Government for purposes of the constitutional *obligations* of Government—such as the obligation to respect an artist's First Amendment rights—Amtrak is *not* part of the Government for purposes of the inherent *powers and privileges* of the Government." Pl.'s Opp. & Reply at 8 (emphases in original). AAR's due-process challenge plainly belongs in the former camp. Just as the Government is obligated to respect individuals' First Amendment rights, *see Lebron*, 513 U.S. at 399, 115 S. Ct. 961, so too is it constitutionally required to respect their due-process rights. Consistent with the standard Plaintiff itself enumerates, then, Amtrak is a governmental entity in the context of this claim. *See id.* (holding that Amtrak "is an agency of the Government . . . for purposes of the constitutional obligations of Government").

Perhaps recognizing that *Lebron* poses an insurmountable barrier to its argument that Amtrak is a private entity for purposes of its due-process claim, AAR attempts to raise two alternative arguments in its Opposition and Reply. *See* Pl.'s Opp. & Reply at 15-17. First, it contends that § 207 violates its members' due-process rights even if Amtrak is a governmental

entity. *See id.* at 15-16. Amtrak's pecuniary incentives, it argues, are so significant as to constitute a due-process violation even if Amtrak is not a private party. *See id.* (distinguishing, *e.g.*, *Marshall v. Jerrico*, 446 U.S. 238, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980), which held that an agency's having a "remote" financial interest in proceedings did not violate due process, *id.* at 243-52, 100 S. Ct. 1610). Second, AAR suggests that finding Amtrak to be a governmental entity renders its structure unconstitutional under the Appointments Clause. *See id.* at 16-17.

Neither argument, however, was raised in AAR's initial brief, and both are outside the scope of its Complaint, which premises its due-process claim on Amtrak's status as a private entity. *See* Compl., ¶¶ 53-54. Especially given that these arguments are raised only cursorily and that one is a new constitutional claim, the Court declines to address them. *See, e.g.*, *Jo v. Dist. Of Columbia*, 582 F. Supp. 2d 51, 64 (D.D.C. 2008) ("It is well-established in this district that a plaintiff cannot amend his Complaint in an opposition to a defendant's motion for summary judgment."); *Quick v. U.S. Dep't of Commerce*, 775 F. Supp. 2d 174, 183 (D.D.C. 2011). In passing, however, the Court notes that, in light of the FRA's and STB's involvement and Amtrak's political accountability, *see* Section III.B., *infra*, the potential for bias appears remote, and the scheme, accordingly, would likely pass muster under the Due Process Clause. *See Marshall*, 446 U.S. at 243, 100 S. Ct. 1610. Concluding that Amtrak is to be considered part of the government for purposes of Plaintiff's due-process claim, furthermore,

does not necessarily implicate the Appointments Clause issues AAR highlights, which seem to relate more to the nondelegation challenge than the due-process claim. In any event, the Court here goes no further than *Lebron's* clear holding that Amtrak is the government in the context of claims that invoke the Constitution's guarantees of individual rights.

In the end, because Amtrak is a governmental entity for purposes of Plaintiff's due-process challenge, the Court will grant Defendants' Motion and deny Plaintiff's with respect to that claim.

B. *Nondelegation Claim*

Plaintiff's next challenge asserts that Congress unconstitutionally delegated lawmaking authority to Amtrak, a nongovernmental entity, when it gave Amtrak joint responsibility for issuing the Metrics and Standards. This claim thus also takes as its premise that Amtrak is a private entity. *See* Compl., ¶¶ 48-49. Whether *Lebron* dictates Amtrak's status for purposes of this claim, though, is less clear. On the one hand, the structural constitutional principles from which AAR's nondelegation claim derives are distinct—both legally and logically—from the document's guarantees of individual rights. *Lebron*, in fact, approached the question of Amtrak's status with the assumption that its answer could be different with respect to different kinds of claims. Its explicit holding that Amtrak is the government "for the purpose of individual rights guaranteed against the Government by the Constitution," *Lebron*, 513 U.S. at 394, 115 S. Ct. 961, fairly implies that Amtrak's status might be different in the

context of other kinds of constitutional claims—perhaps especially those invoking structural principles in an attempt to limit Congress's ability to utilize private forms.

On the other hand, it is possible to conceive of the nondelegation doctrine, especially when invoked by private parties, as a guarantor of individual rights. *See, e.g., Bond v. United States*, — U.S. —, 131 S. Ct. 2355, 2365, 180 L. Ed. 2d 269 (2011) ("The structural principles secured by the separation of powers protect the individual as well [as the branches of government]."). Looked at this way, AAR's nondelegation claim might fall into the category of individual-rights claims for purposes of which *Lebron* held Amtrak to be a governmental entity. Indeed, given the similarity of AAR's two claims, it would seem strange to consider Amtrak the government for purposes of due process but a private entity for purposes of nondelegation. Alternatively, *Lebron* can be read as holding that Amtrak should be considered part of the government for purposes of *any* constitutional claim. If the Court's logic was that Congress can designate an entity's status for the purpose of things it can control (like other statutes), but cannot change its nature for the purpose of things it cannot control (like the Constitution), *Lebron's* conclusion that Amtrak "is, by its very nature, what the Constitution regards as the Government," *id.* at 392, 115 S. Ct. 961, would appear to apply equally to a nondelegation claim.

The Court, however, need not decide Amtrak's status in the context of AAR's nondelegation challenge. Even if Amtrak is a private entity, as Plaintiff con-

tends, the government retains ultimate control over the promulgation of the Metrics and Standards. Section 207's delegation, accordingly, passes constitutional muster.

Article I of the Constitution provides that "All legislative Powers . . shall be vested in a Congress of the United States." Art. I, § 1, cl. 1. The Supreme Court, nevertheless, has long interpreted the Constitution to permit Congress to delegate legislative power to executive agencies within certain constraints. *See, e.g., Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 41, 6 L. Ed. 253 (1825); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398, 60 S. Ct. 907, 84 L. Ed. 1263 (1940) ("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility."); *Mistretta v. United States*, 488 U.S. 361, 372, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). Courts have also upheld delegations of rulemaking authority to nongovernmental entities, but such delegations are subject to more significant strictures. *See Sunshine Anthracite*, 310 U.S. at 388, 399, 60 S. Ct. 907; *Pittston Co. v. United States*, 368 F.3d 385, 394 (4th Cir.2004); *United States v. Frame*, 885 F.2d 1119, 1128-29 (3d Cir. 1989) (abrogated on other grounds). A delegation to a private party without sufficient government oversight, the Supreme Court has held, is "legislative delegation in its most obnoxious form." *Carter Coal*, 298 U.S. at 311, 56 S. Ct. 855.

A series of cases in the Supreme Court and the Courts of Appeals has partially illuminated the limits of delegations to private entities. In *Sunshine An-*

thracite, for example, the Court upheld a statutory scheme that permitted groups of coal producers to set prices for coal on the ground that those prices would become effective only when approved by the National Bituminous Coal Commission, a government agency. *See* 310 U.S. at 388, 399, 60 S. Ct. 907. In concluding that the delegation was constitutional, the Court emphasized that the private parties "function[ed] subordinately" to the government. *Id.* at 399, 60 S. Ct. 907. In *Pittston*, the Fourth Circuit rejected a challenge to a statute that permitted a private entity to decide whether to refer coal companies to the Secretary of Treasury for an enforcement action. *See* 368 F.3d at 397. Because the private entity's role was merely "advisory" and the Secretary made the ultimate decision as to whether a penalty would be imposed, the court found that the statute complied with constitutional separation-of-powers principles. *See id.* Finally, in *Frame*, a private group of cattle ranchers and importers collected assessments from others in the cattle industry and took "the initiative in planning how those funds [would] be spent." 885 F.2d at 1123, 1128. Because "the amount of government oversight [was] considerable," however, the Third Circuit upheld the statutory provision. *See id.* at 1128-29.

These cases—upon which both parties rely—confirm that Congress cannot delegate to a private party absolute power to enact regulations that will carry the force of law. *See also Carter Coal*, 298 U.S. at 311, 56 S. Ct. 855. A private party may play a role in the rulemaking process, but the Constitution re-

quires that the government retain ultimate control. Section 207 passes this test. Not only is the FRA co-author of the Metrics and Standards—and, as a result, Amtrak could not have promulgated them without the FRA's approval—but the STB also retains control over their enforcement. And even if the involvement of these agencies is not enough to ensure the constitutionality of § 207's delegation, the government retains structural control over Amtrak itself. Taken together, the FRA's and STB's roles and the government's control over Amtrak render the statutory scheme constitutional.

Section 207 of the PRIIA provides that the FRA and Amtrak shall "jointly" develop the Metrics and Standards. While the AAR is correct that this scheme in a sense makes Amtrak the FRA's equal—as opposed to its subordinate—Amtrak cannot promulgate the Metrics and Standards without the agency's approval. In an important sense, this renders the delegation effected by § 207 similar to that upheld in *Sunshine Anthracite*. There, the Court held that a delegation was constitutional because the prices set by the private entity would not be effective unless the government acted to adopt them. *See Sunshine Anthracite*, 310 U.S. at 388, 399, 60 S. Ct. 907. Although the use of language ("jointly") that appears to endow the governmental entity and the private party with equal responsibility for the promulgation of rules makes this scheme appear to constitute a more significant delegation than that upheld in Sunshine Anthracite, that is not necessarily so. In one case, the government acts as a rubber stamp to approve regulations

proposed by a private entity; in the other, the government serves as a coauthor of the regulations and, absent a circumstance not present here, must approve them before they have the effect of law. Why is the latter (the scheme at issue here) a more problematic delegation than the former (*Sunshine Anthracite's* statutory scheme)?

Of course, as AAR repeatedly emphasizes, the coequal roles played by Amtrak and the FRA also entails that the FRA could not enact the Metrics and Standards without *Amtrak's* approval. Conditioning regulation on a private party's assent, however, is not constitutionally problematic. *See, e.g., Currin v. Wallace*, 306 U.S. 1, 15, 59 S. Ct. 379, 83 L. Ed. 441 (1939) (upholding a statute that provided agency could not take particular action unless two-thirds of industry participants favored it). Indeed, the Supreme Court has reasoned that through such schemes the government "merely place[s] a restriction upon its own" ability to regulate. *Id.; see also United States v. Rock Royal Cooperative*, 307 U.S. 533, 577, 59 S. Ct. 993, 83 L. Ed. 1446 (1939) ("requirement of [private party's] approval would not be an invalid delegation"); *Frame*, 885 F.2d at 1127-28.

Looking at the bigger picture, moreover, just as the FRA remains involved with the Metrics and Standards' promulgation, the STB is the entity ultimately responsible for their enforcement. While AAR's challenge is to the delegation of rulemaking authority—not the delegation of enforcement authority—its papers repeatedly reference the Metrics and Standards' enforcement and penalties scheme and question the fun-

damental fairness of Amtrak's role therein. That the STB retains control over the enforcement mechanisms, accordingly, merits mention. True, Amtrak has the power to initiate an investigation by the STB where its on-time performance falls below 80%. *See* 49 U.S.C. § 24308(f)(1). As in *Pittston*, however, it is the governmental entity (here, the STB) that performs the investigation and may ultimately impose penalties. *See Pittston*, 368 F.3d at 397. Merely granting a private party the power of referral—a power, as it happens, that the freight railroads also possess, *see* 49 U.S.C. § 24308(f)(1)—does not pose a constitutional problem. *See Pittston*, 368 F.3d at 397.

All that said, Plaintiff may ultimately be correct that Amtrak plays a larger role in the promulgation of rules under § 207 than the private entities did in the cases on which Defendants rely. Under § 207, the FRA retains equal responsibility for the promulgation of the Metrics and Standards and the STB, not Amtrak, has the ultimate power to enforce them. But, the involvement of the FRA and the STB notwithstanding, the statute's choice of the word "jointly" undoubtedly makes it difficult to characterize Amtrak's role as "subordinate[]," *Sunshine Anthracite*, 310 U.S. at 399, 60 S. Ct. 907, or merely "advisory." *Pittston*, 368 F.3d at 398; *Frame*, 885 F.2d at 1129. If the FRA and STB's involvement were the sum total of the government's control, accordingly, this may have been a more difficult question.

That, however, that is not the case. While the Court assumed for purposes of this discussion that Amtrak is technically a private entity, that does not

mean it assumes away the facts on the ground. The Court hardly need reiterate the indicia of the government's control over Amtrak that it discussed in Section III.A, *supra*, but, in brief: Amtrak was created by special law for the furtherance of governmental objectives, and the government sets its goals; the President appoints eight of the nine directors; Amtrak is required to submit annual reports to Congress and the President; the government owns more than 90% of Amtrak's stock; Amtrak relies on more than a billion dollars in congressional appropriations annually; and Congress sets salary limits for Amtrak's employees. While Congress has declared that Amtrak is to be operated as a "for-profit corporation" and should not be considered "a department, agency, or instrumentality of the United States Government," 49 U.S.C. § 24301(a), the government clearly retains control of the organization. *Cf. Frame*, 885 F.2d at 1128-29 (considering government's structural controls over the private entity as relevant to nondelegation claim); *see also Lebron*, 513 U.S. at 397-400, 115 S. Ct. 961.

Taken together, the involvement of the FRA in promulgating the regulations, the role of the STB in their enforcement, and the government's structural control over Amtrak itself more than suffice. That an entity that shares some characteristics with private corporations is involved in the rulemaking process does not offend the separation-of-powers principle. In the end, § 207 establishes a scheme in which government entities retain control over an entity that, even if technically private, is itself controlled by the government. The Constitution requires no more.

IV. Conclusion

For the foregoing reasons, the Court will issue a contemporaneous Order granting Plaintiffs' Motion for Summary Judgment and denying Defendant's.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 12-5204

ASSOCIATION OF AMERICAN RAILROADS, APPELLANT

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., APPELLEES

[Filed: Oct. 11, 2013]

ORDER

Before: GARLAND, Chief Judge; HENDERSON, ROGERS, TATEL, BROWN, GRIFFITH, KAVANAUGH, and SRINIVASAN, Circuit Judges

Appellees' petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Jennifer M. Clark
Deputy Clerk

APPENDIX D

1. 49 U.S.C. 24101 note (Supp. V 2011) provides in pertinent part:

AMTRAK REFORM AND OPERATIONAL IMPROVEMENTS

Pub. L. 110-432, div. B, title II, §§ 203-209, Oct. 16, 2008, 122 Stat. 4912-4917, provided that:

* * * * *

"SEC. 207. METRICS AND STANDARDS.

"(a) IN GENERAL.—Within 180 days after the date of enactment of this Act [Oct. 16, 2008], the Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services. Such metrics, at a minimum, shall include the percentage of avoidable and fully allocated operating costs covered by passenger revenues on each route, ridership per train mile operated, measures of on-time performance and delays incurred by intercity passenger trains on the rail lines of each rail carrier and, for long-distance routes, measures of connectivity with other routes in

all regions currently receiving Amtrak service and the transportation needs of communities and populations that are not well-served by other forms of intercity transportation. Amtrak shall provide reasonable access to the Federal Railroad Administration in order to enable the Administration to carry out its duty under this section.

"(b) QUARTERLY REPORTS.—The Administrator of the Federal Railroad Administration shall collect the necessary data and publish a quarterly report on the performance and service quality of intercity passenger train operations, including Amtrak's cost recovery, ridership, on-time performance and minutes of delay, causes of delay, on-board services, stations, facilities, equipment, and other services.

"(c) CONTRACTS WITH HOST RAIL CARRIERS.—To the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards developed under subsection (a) into their access and service agreements.

"(d) ARBITRATION.—If the development of the metrics and standards is not completed within the 180-day period required by subsection (a), any party involved in the development of those standards may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration.

* * * * *

2. 49 U.S.C. 24301 provides in pertinent part:

Status and applicable laws

(a) STATUS.—Amtrak—

(1) is a railroad carrier under section 20102(2)[1] and chapters 261 and 281 of this title;

(2) shall be operated and managed as a for-profit corporation; and

(3) is not a department, agency, or instrumentality of the United States Government, and shall not be subject to title 31.

(b) PRINCIPAL OFFICE AND PLACE OF BUSINESS.—The principal office and place of business of Amtrak are in the District of Columbia. Amtrak is qualified to do business in each State in which Amtrak carries out an activity authorized under this part. Amtrak shall accept service of process by certified mail addressed to the secretary of Amtrak at its principal office and place of business. Amtrak is a citizen only of the District of Columbia when deciding original jurisdiction of the district courts of the United States in a civil action.

(c) APPLICATION OF SUBTITLE IV.—Subtitle IV of this title shall not apply to Amtrak, except for sections 11123, 11301, 11322(a), 11502, and 11706. Notwithstanding the preceding sentence, Amtrak shall continue to be considered an employer under the Railroad Retire-

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[1] So in original. Does not conform to section catchline.

ment Act of 1974, the Railroad Unemployment Insurance Act, and the Railroad Retirement Tax Act.

(d) APPLICATION OF SAFETY AND EMPLOYEE RELATIONS LAWS AND REGULATIONS.—Laws and regulations governing safety, employee representation for collective bargaining purposes, the handling of disputes between carriers and employees, employee retirement, annuity, and unemployment systems, and other dealings with employees that apply to a rail carrier subject to part A of subtitle IV of this title apply to Amtrak.

(e) APPLICATION OF CERTAIN ADDITIONAL LAWS.—Section 552 of title 5, this part, and, to the extent consistent with this part, the District of Columbia Business Corporation Act (D.C. Code § 29-301 et seq.) apply to Amtrak. Section 552 of title 5, United States Code, applies to Amtrak for any fiscal year in which Amtrak receives a Federal subsidy.

* * * * *

3. 49 U.S.C. 24302 (Supp. V 2011) provides:

Board of directors

(a) COMPOSITION AND TERMS.—

(1) The Amtrak Board of Directors (referred to in this section as the "Board") is composed of the following 9 directors, each of whom must be a citizen of the United States:

(A) The Secretary of Transportation.

(B) The President of Amtrak.

(C) 7 individuals appointed by the President of the United States, by and with the advice and consent of the Senate, with general business and financial experience, experience or qualifications in transportation, freight and passenger rail transportation, travel, hospitality, cruise line, or passenger air transportation businesses, or representatives of employees or users of passenger rail transportation or a State government.

(2) In selecting individuals described in paragraph (1) for nominations for appointments to the Board, the President shall consult with the Speaker of the House of Representatives, the minority leader of the House of Representatives, the majority leader of the Senate, and the minority leader of the Senate and try to provide adequate and balanced representation of the major geographic regions of the United States served by Amtrak.

(3) An individual appointed under paragraph (1)(C) of this subsection shall be appointed for a term of 5 years. Such term may be extended until the individual's successor is appointed and qualified. Not more than 5 individuals appointed under paragraph (1)(C) may be members of the same political party.

(4) The Board shall elect a chairman and a vice chairman, other than the President of Amtrak, from among its membership. The vice chairman shall serve as chairman in the absence of the chairman.

(5) The Secretary may be represented at Board meetings by the Secretary's designee.

(b) PAY AND EXPENSES.—Each director not employed by the United States Government or Amtrak is entitled to reasonable pay when performing Board duties. Each director not employed by the United States Government is entitled to reimbursement from Amtrak for necessary travel, reasonable secretarial and professional staff support, and subsistence expenses incurred in attending Board meetings.

(c) TRAVEL.—(1) Each director not employed by the United States Government shall be subject to the same travel and reimbursable business travel expense policies and guidelines that apply to Amtrak's executive management when performing Board duties.

(2) Not later than 60 days after the end of each fiscal year, the Board shall submit a report describing all travel and reimbursable business travel expenses paid to each director when performing Board duties to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate.

(3) The report submitted under paragraph (2) shall include a detailed justification for any travel or reimbursable business travel expense that deviates from Amtrak's travel and reimbursable business travel expense policies and guidelines.

(d) VACANCIES.—A vacancy on the Board is filled in the same way as the original selection, except that an individual appointed by the President of the United

States under subsection (a)(1)(C) of this section to fill a vacancy occurring before the end of the term for which the predecessor of that individual was appointed is appointed for the remainder of that term. A vacancy required to be filled by appointment under subsection (a)(1)(C) must be filled not later than 120 days after the vacancy occurs.

(e) QUORUM.—A majority of the members serving shall constitute a quorum for doing business.

(f) BYLAWS.—The Board may adopt and amend bylaws governing the operation of Amtrak. The bylaws shall be consistent with this part and the articles of incorporation.

4. 49 U.S.C. 24303 provides:

Officers

(a) APPOINTMENTS AND TERMS.—Amtrak has a President and other officers that are named and appointed by the board of directors of Amtrak. An officer of Amtrak must be a citizen of the United States. Officers of Amtrak serve at the pleasure of the board.

(b) PAY.—The board may fix the pay of the officers of Amtrak. An officer may not be paid more than the general level of pay for officers of rail carriers with comparable responsibility. The preceding sentence shall not apply for any fiscal year for which no Federal assistance is provided to Amtrak.

(c) CONFLICTS OF INTEREST.—When employed by Amtrak, an officer may not have a financial or employment relationship with another rail carrier, except that holding securities issued by a rail carrier is not deemed to be a violation of this subsection if the officer holding the securities makes a complete public disclosure of the holdings and does not participate in any decision directly affecting the rail carrier.

5. 49 U.S.C. 24308 (2006 & Supp. V 2011) provides:

Use of facilities and providing services to Amtrak

(a) GENERAL AUTHORITY.—(1) Amtrak may make an agreement with a rail carrier or regional transportation authority to use facilities of, and have services provided by, the carrier or authority under terms on which the parties agree. The terms shall include a penalty for untimely performance.

(2)(A) If the parties cannot agree and if the Surface Transportation Board finds it necessary to carry out this part, the Board shall—

(i) order that the facilities be made available and the services provided to Amtrak; and

(ii) prescribe reasonable terms and compensation for using the facilities and providing the services.

(B) When prescribing reasonable compensation under subparagraph (A) of this paragraph, the Board shall consider quality of service as a major factor when

determining whether, and the extent to which, the amount of compensation shall be greater than the incremental costs of using the facilities and providing the services.

(C) The Board shall decide the dispute not later than 90 days after Amtrak submits the dispute to the Board.

(3) Amtrak's right to use the facilities or have the services provided is conditioned on payment of the compensation. If the compensation is not paid promptly, the rail carrier or authority entitled to it may bring an action against Amtrak to recover the amount owed.

(4) Amtrak shall seek immediate and appropriate legal remedies to enforce its contract rights when track maintenance on a route over which Amtrak operates falls below the contractual standard.

(b) OPERATING DURING EMERGENCIES.—To facilitate operation by Amtrak during an emergency, the Board, on application by Amtrak, shall require a rail carrier to provide facilities immediately during the emergency. The Board then shall promptly prescribe reasonable terms, including indemnification of the carrier by Amtrak against personal injury risk to which the carrier may be exposed. The rail carrier shall provide the facilities for the duration of the emergency.

(c) PREFERENCE OVER FREIGHT TRANSPORTATION.—Except in an emergency, intercity and commuter rail passenger transportation provided by or for

Amtrak has preference over freight transportation in using a rail line, junction, or crossing unless the Board orders otherwise under this subsection. A rail carrier affected by this subsection may apply to the Board for relief. If the Board, after an opportunity for a hearing under section 553 of title 5, decides that preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers, the Board shall establish the rights of the carrier and Amtrak on reasonable terms.

(d) ACCELERATED SPEEDS.—If a rail carrier refuses to allow accelerated speeds on trains operated by or for Amtrak, Amtrak may apply to the Board for an order requiring the carrier to allow the accelerated speeds. The Board shall decide whether accelerated speeds are unsafe or impracticable and which improvements would be required to make accelerated speeds safe and practicable. After an opportunity for a hearing, the Board shall establish the maximum allowable speeds of Amtrak trains on terms the Board decides are reasonable.

(e) ADDITIONAL TRAINS.—(1) When a rail carrier does not agree to provide, or allow Amtrak to provide, for the operation of additional trains over a rail line of the carrier, Amtrak may apply to the Board for an order requiring the carrier to provide or allow for the operation of the requested trains. After a hearing on the record, the Board may order the carrier, within 60 days, to provide or allow for the operation of the requested trains on a schedule based on legally permissible operating times. However, if the Board decides

not to hold a hearing, the Board, not later than 30 days after receiving the application, shall publish in the Federal Register the reasons for the decision not to hold the hearing.

(2) The Board shall consider—

(A) when conducting a hearing, whether an order would impair unreasonably freight transportation of the rail carrier, with the carrier having the burden of demonstrating that the additional trains will impair the freight transportation; and

(B) when establishing scheduled running times, the statutory goal of Amtrak to implement schedules that attain a system-wide average speed of at least 60 miles an hour that can be adhered to with a high degree of reliability and passenger comfort.

(3) Unless the parties have an agreement that establishes the compensation Amtrak will pay the carrier for additional trains provided under an order under this subsection, the Board shall decide the dispute under subsection (a) of this section.

(f) PASSENGER TRAIN PERFORMANCE AND OTHER STANDARDS.—

(1) INVESTIGATION OF SUBSTANDARD PERFORMANCE.—If the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters, or the service quality of intercity passenger train operations for which minimum standards are established under section 207 of the Passenger Rail Investment and Improvement Act of 2008 fails to meet those

standards for 2 consecutive calendar quarters, the Surface Transportation Board (referred to in this section as the "Board") may initiate an investigation, or upon the filing of a complaint by Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service, the Board shall initiate such an investigation, to determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators. As part of its investigation, the Board has authority to review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays. In making its determination or carrying out such an investigation, the Board shall obtain information from all parties involved and identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train.

(2) PROBLEMS CAUSED BY HOST RAIL CARRIER. —If the Board determines that delays or failures to achieve minimum standards investigated under paragraph (1) are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation as required under subsection (c), the Board may award damages against the host rail carrier, including prescribing such other relief to Amtrak as it determines to be reasonable and

appropriate pursuant to paragraph (3) of this subsection.

(3) DAMAGES AND RELIEF.—In awarding damages and prescribing other relief under this subsection the Board shall consider such factors as—

(A) the extent to which Amtrak suffers financial loss as a result of host rail carrier delays or failure to achieve minimum standards; and

(B) what reasonable measures would adequately deter future actions which may reasonably be expected to be likely to result in delays to Amtrak on the route involved.

(4) USE OF DAMAGES.—The Board shall, as it deems appropriate, order the host rail carrier to remit the damages awarded under this subsection to Amtrak or to an entity for which Amtrak operates intercity passenger rail service. Such damages shall be used for capital or operating expenditures on the routes over which delays or failures to achieve minimum standards were the result of a rail carrier's failure to provide preference to Amtrak over freight transportation as determined in accordance with paragraph (2).

6. 49 U.S.C. 24710 (Supp. V 2011) provides:

Long-distance routes

(a) ANNUAL EVALUATION.—Using the financial and performance metrics developed under section 207 of

the Passenger Rail Investment and Improvement Act of 2008, Amtrak shall—

(1) evaluate annually the financial and operating performance of each long-distance passenger rail route operated by Amtrak; and

(2) rank the overall performance of such routes for 2008 and identify each long-distance passenger rail route operated by Amtrak in 2008 according to its overall performance as belonging to the best performing third of such routes, the second best performing third of such routes, or the worst performing third of such routes.

(b) PERFORMANCE IMPROVEMENT PLAN.—Amtrak shall develop and post on its website a performance improvement plan for its long-distance passenger rail routes to achieve financial and operating improvements based on the data collected through the application of the financial and performance metrics developed under section 207 of that Act. The plan shall address—

(1) on-time performance;

(2) scheduling, frequency, routes, and stops;

(3) the feasibility of restructuring service into connected corridor service;

(4) performance-related equipment changes and capital improvements;

(5) on-board amenities and service, including food, first class, and sleeping car service;

(6) State or other non-Federal financial contributions;

(7) improving financial performance;

(8) anticipated Federal funding of operating and capital costs; and

(9) other aspects of Amtrak's long-distance passenger rail routes that affect the financial, competitive, and functional performance of service on Amtrak's long-distance passenger rail routes.

(c) IMPLEMENTATION.—Amtrak shall implement the performance improvement plan developed under subsection (b)—

(1) beginning in fiscal year 2010 for those routes identified as being in the worst performing third under subsection (a)(2);

(2) beginning in fiscal year 2011 for those routes identified as being in the second best performing third under subsection (a)(2); and

(3) beginning in fiscal year 2012 for those routes identified as being in the best performing third under subsection (a)(2).

(d) ENFORCEMENT.—The Federal Railroad Administration shall monitor the development, implementation, and outcome of improvement plans under this section. If the Federal Railroad Administration determines that Amtrak is not making reasonable progress in implementing its performance improvement plan or, after the performance improvement plan is implemented under subsection (c)(1) in accordance

with the terms of that plan, Amtrak has not achieved the outcomes it has established for such routes, under the plan for any calendar year, the Federal Railroad Administration—

(1) shall notify Amtrak, the Inspector General of the Department of Transportation, the Committee on Transportation and Infrastructure of the House of Representatives, and the Committee on Commerce, Science, and Transportation of the Senate of its determination under this subsection;

(2) shall provide Amtrak with an opportunity for a hearing with respect to that determination; and

(3) may withhold appropriated funds otherwise available to Amtrak for the operation of a route or routes from among the worst performing third of routes currently served by Amtrak on which Amtrak is not making reasonable progress, other than funds made available for passenger safety or security measures.

7. 49 U.S.C. 24902 provides in pertinent part:

Goals and requirements

(a) MANAGING COSTS AND REVENUES.—Amtrak shall manage its operating costs, pricing policies, and other factors with the goal of having revenues derived each fiscal year from providing intercity rail passenger transportation over the Northeast Corridor route between the District of Columbia and Boston, Massa-

chusetts, equal at least the operating costs of providing that transportation in that fiscal year.

(b) PRIORITIES IN SELECTING AND SCHEDULING PROJECTS.—When selecting and scheduling specific projects, Amtrak shall apply the following considerations, in the following order of priority:

(1) Safety-related items should be completed before other items because the safety of the passengers and users of the Northeast Corridor is paramount.

(2) Activities that benefit the greatest number of passengers should be completed before activities involving fewer passengers.

(3) Reliability of intercity rail passenger transportation must be emphasized.

(4) Trip-time requirements of this section must be achieved to the extent compatible with the priorities referred to in paragraphs (1)-(3) of this subsection.

(5) Improvements that will pay for the investment by achieving lower operating or maintenance costs should be carried out before other improvements.

(6) Construction operations should be scheduled so that the fewest possible passengers are inconvenienced, transportation is maintained, and the on-time performance of Northeast Corridor commuter rail passenger and rail freight transportation is optimized.

(7) Planning should focus on completing activities that will provide immediate benefits to users of the Northeast Corridor.

(c) COMPATIBILITY WITH FUTURE IMPROVEMENTS AND PRODUCTION OF MAXIMUM LABOR BENEFITS.—Improvements under this section shall be compatible with future improvements in transportation and shall produce the maximum labor benefit from hiring individuals presently unemployed.

(d) AUTOMATIC TRAIN CONTROL SYSTEMS.—A train operating on the Northeast Corridor main line or between the main line and Atlantic City shall be equipped with an automatic train control system designed to slow or stop the train in response to an external signal.

(e) HIGH-SPEED TRANSPORTATION.—If practicable, Amtrak shall establish intercity rail passenger transportation in the Northeast Corridor that carries out section 703(1)(E) of the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94–210, 90 Stat. 121).

(f) EQUIPMENT DEVELOPMENT.—Amtrak shall develop economical and reliable equipment compatible with track, operating, and marketing characteristics of the Northeast Corridor, including the capability to meet reliable trip times under section 703(1)(E) of the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210, 90 Stat. 121) in regularly scheduled revenue transportation in the Corridor, when the Northeast Corridor improvement program is completed. Amtrak must decide that equipment complies with this subsection before buying equipment

with financial assistance of the Government. Amtrak shall submit a request for an authorization of appropriations for production of the equipment.

* * * * *

OPPOSITION BRIEF

No. 13-1080

IN THE

Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,
Petitioners,

v.

ASSOCIATION OF AMERICAN RAILROADS,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Amtrak "is not a department, agency, or instrumentality of the United States Government," 49 U.S.C. § 24301(a)(3), yet Section 207 of the Passenger Rail Investment and Improvement Act of 2008 grants Amtrak the power to co-author regulations governing private freight railroads. A unanimous panel of the D.C. Circuit held Section 207 unconstitutional.

The questions presented are:

1. Whether Section 207 violates the nondelegation principle.

2. Whether Section 207 violates the Due Process Clause.

RULE 29.6 STATEMENT

The Association of American Railroads is a trade association. It has no parent corporation and there is no publicly held company that owns 10% or more of its stock.

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BRIEF IN OPPOSITION

Respondent Association of American Railroads respectfully submits this brief in opposition to the petition for a writ of certiorari filed by the United States Department of Transportation, et al.

STATEMENT

The Government's petition barely addresses, and does not satisfy, this Court's criteria for granting review. *See* S. Ct. Rule 10. This case does not even arguably implicate a circuit split and presents a narrow question of limited jurisprudential significance. The Government does not identify any coherent policy purpose behind the odd and unprecedented rulemaking procedure at issue here. This Court has stated many times that it does not grant review merely to engage in error correction, yet that is all the petition requests.

There was no error here in any event. The unanimous D.C. Circuit panel faithfully applied this Court's precedents in holding that Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) effected an unconstitutional delegation. The court of appeals correctly explained that PRIIA § 207 creates an unprecedented and untenable situation: a for-profit corporation exercising Article I legislative power over other private companies in the same industry, and wielding its regulatory authority to gain a commercial advantage. A statute that attempts to confer such power "is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of oth-

ers in the same business." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

The petition for a writ of certiorari should be denied.

1. In 1970, Congress established the National Railroad Passenger Corporation, better known as Amtrak, to engage in the commercial enterprise of providing intercity passenger rail service. *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 454 (1985). Congress's purpose was to "revitalize rail passenger service in the expectation that the rendering of such service along certain corridors can be made a profitable commercial undertaking." H.R. Rep. No. 91-1580 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4735, 4735.

Congress specifically provided that Amtrak "is not a department, agency, or instrumentality of the United States Government" but is rather a private, "for-profit corporation" and "shall be operated and managed" as such. 49 U.S.C. § 24301(a)(2)-(3); *see also Atchison*, 470 U.S. at 454-55 (Amtrak is "a private, for-profit corporation" that "is not 'an agency or establishment' of the Government but is authorized by the Government to operate or contract for the operation of intercity rail passenger service."). Establishing Amtrak as a private corporation was consistent with historic practice, as "[o]peration of passenger railroads, no less than operation of freight railroads, has traditionally been a function of private industry, not . . . government[ ]." *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 686 (1982).

Amtrak began offering passenger service on May 1, 1971. *Atchison*, 470 U.S. at 456. Because essentially all of the Nation's rail infrastructure was

owned at the time by the freight railroads, the only option was to operate Amtrak's passenger trains over the freight railroads' tracks. The same is true today: Amtrak runs primarily on tracks owned by host freight railroads. In fact, 97 percent of the 22,000 miles of track over which Amtrak operates is owned by freight railroads. JA 155; *see also Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 410 (1992) ("Most of Amtrak's passenger trains run over existing track systems owned and used by freight railroads.").

The tracks used by the Amtrak trains are also used by the host railroads to move freight traffic. Just as an air-traffic controller manages departures and landings at a busy airport, the freight railroads must carefully schedule and manage the timing and sequencing of the passenger and freight trains operating on their tracks to minimize back-ups and delays. Thus, while Amtrak and the freight railroads do not compete for customers, they do compete over access to a limited resource: capacity, or the ability to operate trains within the limited slots available on a rail line.

Amtrak has entered into contracts with the freight railroads that host its trains. These contracts—commonly known as operating agreements—are painstakingly negotiated documents that were executed soon after Amtrak's creation and have been amended or renegotiated over the years. *See* JA 261, 268, 275-76, 282-83. The operating agreements establish the agreed-upon conditions governing Amtrak's use of the freight railroads' tracks, and spell out the rights and duties of the parties. *Atchison*, 470 U.S. at 455. The Department of Transportation has recognized that "the operating

agreements between Amtrak and its host railroads are private agreements among private parties." JA 151.

2. Congress enacted PRIIA in 2008. *See* Pub. L. No. 110-432, Division B, 122 Stat. 4848, 4907 (codified generally in Title 49). Section 207(a) of PRIIA provides:

> Within 180 days after the date of enactment of this Act [Oct. 16, 2008], the Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services.

Section 207(c) of PRIIA, entitled "Contracts With Host Rail Carriers," provides: "To the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards developed under subsection (a) into their access and service agreements."

Section 207(d) provides that if Amtrak and the Federal Railroad Administration (FRA) fail to reach agreement on the content of the Metrics and Standards, or for whatever reason do not timely promulgate the Metrics and Standards, "any party involved

in the development of those standards may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration."

Section 213(a) of PRIIA empowers the Surface Transportation Board (STB) to investigate violations of the Metrics and Standards. If Amtrak's "ontime performance"—a term defined by the Metrics and Standards, *see* PRIIA § 207(a)—falls below 80 percent for two consecutive quarters, or if Amtrak's service fails to satisfy other Metrics and Standards, the Board "may" initiate an investigation—and "shall" launch an investigation if Amtrak or a host railroad files a complaint. *Id.* § 213(a). The Board's investigation will "determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators." *Id.*

Section 213(a) further provides: "If the Board determines that delays or failures to achieve minimum standards . . . are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation," as required by 49 U.S.C. § 24308(c), "the Board may award damages against the host rail carrier" and "prescrib[e] such other relief to Amtrak as it determines to be reasonable and appropriate." In fashioning a remedy, the Board may consider the need for compensation as well as deterrence, and may "order the host rail carrier to remit the damages awarded under this subsection to Amtrak." PRIIA § 213(a).

Amtrak and the FRA published proposed Metrics and Standards on March 13, 2009, JA 23, and "jointly issu[ed]" their final rule on May 6, 2010. JA 59, 82. The final rule stated that "the FRA and Amtrak jointly drafted performance metrics and standards for intercity passenger rail service," and designated both an FRA official and an Amtrak employee as the contacts for further information. JA 59. The rule also stated that the FRA had prepared its responses to the comments on the proposed rule "with Amtrak's concurrence." JA 61. With regard to concerns expressed by several commenters about Amtrak's role in developing the Metrics and Standards, Amtrak and the FRA responded that the statute left them no choice. They explained that "PRIIA, the statutory basis for these performance measures, directly incorporates Amtrak into their creation by stating that FRA and Amtrak 'shall jointly' develop the Metrics and Standards." JA 64.

The final rule provided that Amtrak's on-time performance for each of its routes be assessed by reference to three metrics, each of which must be met for ontime performance to be deemed satisfactory: Effective Speed, Endpoint On-Time Performance, and All-Stations On-Time Performance. These standards and performance requirements are far more demanding than provisions in the existing contracts between Amtrak and the host freight railroads. *See, e.g.*, JA 258, 261, 265, 269, 281. The Metrics and Standards became effective on May 11, 2010. JA 98.

3. The freight railroads are already burdened by their obligation to host Amtrak trains. PRIIA and the Metrics and Standards exacerbate these burdens in many respects. Among other things, the Metrics

and Standards place greater demands on the host freight railroads and adversely affect their operations and ability to serve their customers. As one railroad official explained, efforts "to achieve the Metrics and Standards will come at the expense of our freight traffic, which in many cases must be delayed." JA 267. "For this reason, the Metrics and Standards adversely affect our business by making it more difficult to serve our freight customers and to operate an efficient freight rail network." *Id.*; *see also* JA 262, 266, 273-74, 281. Indeed, the very day that Amtrak and the FRA issued their regulations, a senior Amtrak official emailed a copy of the regulations to a Union Pacific official, and stated: "These Metrics and Standards will have a big impact on UP and Amtrak." JA 283.

That prediction was accurate. The freight railroads have taken many steps in an effort to meet the Metrics and Standards, including modifying freight train schedules to accommodate Amtrak trains, rescheduling maintenance work, rerouting freight traffic, and diverting internal resources. *See* JA 257-61, 267-68, 274, 281-82.

Notwithstanding the freight railroads' extensive efforts, the FRA's reports demonstrate that the Metrics and Standards are not being met on numerous routes. In February 2011, the FRA issued its first quarterly report identifying the freight railroads' lines on which the Metrics and Standards were not being met. JA 193-255. The report determined that the Metrics and Standards were not achieved on most of Amtrak's routes during the July-September 2010 period. The FRA issued subsequent quarterly reports based upon Amtrak's data reflecting the same conclusion: the Metrics and Standards were not

being met on most routes. *See* JA 257-58, 266, 273, 281; District Court Docket No. 8, Attachment Nos. 16, 17, 18 (FRA Quarterly Performance Reports from April, July and September 2011). Armed with such evidence, Amtrak filed a petition for relief with the STB against Canadian National, claiming that the freight railroad "refused to adopt measures necessary to satisfy the standards developed pursuant to Section 207." JA 377.

The Metrics and Standards affect the freight railroads in another way. PRIIA § 207 directs the freight railroads to "incorporate the metrics and standards . . . into their access and service agreements" with Amtrak "[t]o the extent practicable." Amtrak has stated that it expects the freight railroads to amend their operating agreements to incorporate the Metrics and Standards pursuant to Section 207. JA 275-76.

4. The Association of American Railroads (AAR) challenged PRIIA § 207 as violating both the nondelegation principle and the Due Process Clause. The parties agreed that discovery was unnecessary and that the case could be resolved through cross-motions for summary judgment.

The district court concluded that Section 207 was constitutional. While the court acknowledged that "AAR is correct that this scheme in a sense makes Amtrak the FRA's equal—as opposed to its subordinate" in the rulemaking process, Pet. App. 46a, it held that Section 207 was nonetheless a constitutional delegation of power because "the government retains ultimate control over the promulgation of the Metrics and Standards." *Id.* at 44a. The court also held that Section 207 did not violate the Due Process Clause, reasoning that under *Lebron v. National*

Railroad Passenger Corp., 513 U.S. 374 (1995), Amtrak was the Government "for the purpose of individual rights guaranteed against the Government by the Constitution." Pet. App. 37a (internal quotation marks omitted).

The D.C. Circuit reversed. It held that Section 207 "constitutes an unlawful delegation of regulatory power to a private entity." Pet. App. 3a. The court began "with a principle upon which both sides agree: Federal lawmakers cannot delegate regulatory authority to a private entity." *Id.* at 7a. It then noted "the unprecedented regulatory powers delegated to Amtrak" by Section 207, observing that under the scheme "Amtrak enjoys authority equal to the FRA." *Id.* at 10a. "Should the FRA prefer an alternative to Amtrak's proposed metrics and standards, § 207 leaves it impotent to choose its version without Amtrak's permission." *Id.* The court added that "the government revealingly cites no case—nor have we found any—embracing the position that a private entity may jointly exercise regulatory power on equal footing with an administrative agency." *Id.* at 14a. The court also noted that Section 207(d)'s arbitration provision "polluted the rulemaking process over and above the other defects besetting the statute," in that it "stacked the deck in favor of compromise" by giving Amtrak the power to outsource the rulemaking and making it "entirely possible for metrics and standards to go into effect that had not been assented to by a single representative of the government." *Id.* at 15a. For all of these reasons, the court concluded, Section 207 effects an unconstitutional delegation "[u]nless it can be established that Amtrak is an organ of the government." *Id.* at 16a.

The D.C. Circuit next determined that "Amtrak is a private corporation with respect to Congress's

power to delegate regulatory authority." Pet. App. 23a. Although many of Amtrak's Board Members are presidentially appointed and the Government owns most of its stock, Congress expressly provided that Amtrak "shall be operated and managed as a for-profit corporation" and "is not a department, agency, or instrumentality of the United States Government," 49 U.S.C. § 24301(a)(2)-(3). "In deciding Amtrak's status for purposes of congressional delegations, these declarations are dispositive." Pet. App. 23a. The court emphasized that, by delegating rulemaking power to an entity that Congress and Amtrak itself publicly describe as a private company, the Government could evade accountability for the resulting regulations. *Id.* at 18a. The court also noted that "[p]erverse incentives abound" because "[n]othing about the government's involvement in Amtrak's operations restrains the corporation from devising metrics and standards that inure to its own financial benefit rather than the common good." *Id.* at 20a. Finally, even though the Government had "[s]trangely" avoided discussing *Lebron* in its brief, the court nonetheless examined *Lebron* and concluded that this Court "did not opine on Amtrak's status with respect to the federal government's structural powers under the Constitution." *Id.* at 20a n.8, 22a.

The court denied the Government's petition for rehearing en banc. Pet. App. 51a.

REASONS FOR DENYING THE PETITION

This case meets none of this Court's traditional criteria for granting certiorari. *See* S. Ct. Rule 10. As the Government itself concedes, Pet. 24, the D.C. Circuit's decision does not conflict with the decisions of other circuits. Nor does the decision below conflict with any decision of this Court. Instead, the D.C.

Circuit faithfully applied this Court's nondelegation caselaw in holding that Amtrak—a private, for-profit corporation, *see* 49 U.S.C. § 24301(a)—could not be given the power to co-author federal regulations governing the railroad industry, or the power to force a federal agency to accept the judgment of a private arbitrator as to the content of those regulations.

The Government does not provide any credible reason why this case warrants plenary review. It does not argue that the decision below will have a broad effect—or for that matter *any* effect beyond the narrow confines of this case and this Amtrak-specific statute. And the Government notably fails to explain why Congress would need the ability to make this novel sort of delegation to accomplish its legislative objectives—in this context or in any other context. Here, for example, if Congress believes it is important to develop performance metrics for Amtrak, it can easily do so in a way that does not violate the Constitution.

This Court's review is not warranted simply because a lower court has invalidated a federal statute, as the Government seems to think. The Court has denied review in many other cases where a lower court has struck down a federal statute, but the Government failed to make the case for certiorari. *See infra* Part II. It should deny review here too.

I. THE DECISION BELOW IS CORRECT AND DOES NOT CONFLICT WITH DECISIONS OF THIS OR ANY OTHER COURT.

The nondelegation principle and the Due Process Clause bar private parties from wielding the lawmaking power of the sovereign for their own commercial advantage. Section 207 makes Amtrak an entity without precedent in our constitutional sys-

tem: a corporation that simultaneously acts as a profit-maximizing commercial actor *and* as a Government regulator of the very industry in which it is a market participant. Permitting Congress to delegate its Article I power in this way would be dangerous not only to our constitutional structure, but also to businesses that will face the chilling prospect of a for-profit market competitor endowed with the sovereign lawmaking authority of the United States and a mandate to regulate other companies in the same industry.

As the D.C. Circuit correctly observed—and as the Government does not appear to dispute—"the Supreme Court has never approved a regulatory scheme that so drastically empowers a private entity in the way § 207 empowers Amtrak." Pet. App. 9a.

A. Section 207 Is An Impermissible Delegation.

1. The Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States." Art. I, § 1. Whereas Congress may vest Executive Branch agencies with rulemaking authority, it may not grant such power to private corporations.[1]

More than 70 years ago, this Court held that it is unconstitutional to delegate to private individuals or companies the power to promulgate regulations governing the conduct of other private parties. *See Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). In

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[1] This constitutional prohibition is "the lesser-known cousin" of the more prominent nondelegation principle that when Congress grants rulemaking authority to an Executive Branch agency, it must "prescribe an intelligible principle governing the statute's enforcement." Pet. App. 7a-8a.

Carter Coal, the Court struck down a statute that granted certain coal producers and miners the power to issue rules setting maximum labor hours and minimum wages. *See id.* at 310-11. The Court explained that a delegation of rulemaking authority to a private party "is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Id.* at 311. The Court emphasized that "one person may not be intrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property." *Id.*

The Court revisited the nondelegation principle in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940), where it held that Congress may give private entities a role in rulemaking provided that they "function subordinately" to the Government. *Adkins* involved a statute authorizing members of the coal industry to propose minimum coal prices to the National Bituminous Coal Commission, a Government agency. The Court concluded that Congress had not impermissibly delegated its legislative authority to the industry, because under the statutory scheme, the private actors merely *proposed* minimum prices—it was the Government that had complete and unfettered authority to *determine* the minimum prices. *Id.* at 388, 399.

Following *Carter Coal* and *Adkins*, the courts of appeals have held that Congress may grant private entities no more than a "ministerial" or "advisory"

role in the exercise of Government power. For example, in *Pittston Co. v. United States*, 368 F.3d 385 (4th Cir. 2004), the Fourth Circuit "summarize[d] the Supreme Court's holdings" in this area as "articulat[ing] the standard that Congress may employ private entities for *ministerial* or *advisory* roles, but it may not give these entities governmental power over others." *Id.* at 395 (emphases in original). Similarly, in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *abrogated on other grounds by Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), the Third Circuit turned away a nondelegation challenge on the basis that, under the statute in question, the private entities merely "serve[d] an advisory function" and "a ministerial one," and thus did not transgress constitutional boundaries. *Id.* at 1129.

The D.C. Circuit faithfully applied these standards in holding that PRIIA § 207 impermissibly grants Amtrak—a private, "for-profit corporation," 49 U.S.C. § 24301(a)(2)—legislative and rulemaking authority. *See* Pet. App. 7a-16a. Amtrak does not "function subordinately" to the Government under the statute. *Adkins*, 310 U.S. at 399. To the contrary, the statute's plain text, which provides that Amtrak and the FRA shall "jointly" develop and promulgate the Metrics and Standards, enshrines Amtrak and the FRA as co-equal partners in the rulemaking process. Indeed, throughout the rulemaking, Amtrak and the FRA emphasized that they were acting jointly and as co-equals. *See, e.g.*, JA 98 ("the FRA and Amtrak have jointly made, and are jointly issuing, revisions to the Metrics and Standards"). Before the D.C. Circuit, the Government described Amtrak as the "co-author" of the regulations. Gov't CADC Br. at 18.

By enacting Section 207, Congress forced the FRA to compromise with a private party by delegating to the private party one-half of the lawmaking power, thus creating a scheme in which Amtrak held the trump card and could veto the FRA's preferred approach and force the agency into arbitration. That delegation of legislative authority to a private entity is flatly at odds with this Court's decision in *Carter Coal* and the settled constitutional principles on which that decision rests.

As the D.C. Circuit correctly observed, Section 207 closely resembles the statute struck down in *Carter Coal*, where the private parties were not limited to a subordinate—*i.e.*, ministerial or advisory—role, but were given actual rulemaking power. *See* Pet. App. 14a ("Section 207 is as close to the blatantly unconstitutional scheme in *Carter Coal* as we have seen."). The Government has never identified a similar statute—one that vests a private, for-profit corporation with regulatory authority over other companies in the same industry. This is another strong indicator that Section 207 is unconstitutional. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3158, 3159 (2010) ("Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity.") (internal quotation marks omitted).

The D.C. Circuit's decision is consistent with the underlying purposes of the nondelegation principle, one of which is to ensure that private companies "are not able to use their position for their own advantage [and] to the disadvantage of their fellow citizens." *Pittston Co.*, 368 F.3d at 398. Here, "Amtrak may not compete with the freight railroads for customers, but it does compete with them for use of their scarce

track." Pet. App. 19a. In that regard, Section 207 "grants Amtrak a distinct competitive advantage: a hand in limiting the freight railroads' exercise of their property rights over an essential resource." *Id.* Amtrak seized that competitive advantage by drafting regulations that require the freight railroads to modify their operations and delay freight traffic in order to benefit Amtrak's for-profit business. It should be no surprise that the Metrics and Standards are skewed in Amtrak's favor. The on-time performance requirements, for example, are not remotely realistic. What is more, the Metrics and Standards rely on Amtrak-generated "Conductor Delay Reports" to assign responsibility for particular delays. Thus, Amtrak has not only written the rules governing the business operations of the freight railroads—it also creates and supplies the evidence that will be used to determine responsibility for violations of the rules it drafted. Section 207 has created a system in which Amtrak is poised to reap substantial benefits from the parties it is regulating.

Amtrak can wield its lawmaking authority to its own commercial advantage in another way: It can leverage its power under Section 207(c)—the provision requiring the freight railroads to incorporate the regulations into their contracts with Amtrak to the extent practicable—in an attempt to pressure the freight railroads to rewrite those contracts or otherwise grant Amtrak concessions or benefits. The Department of Transportation has acknowledged that these contracts are "private agreements among private parties." JA 151. The contract provision makes abundantly clear that Section 207 violates the nondelegation principle, as it enables one private party to wield Government power in an attempt to rewrite

private contracts at the expense of the other private party.

The Government nevertheless contends that the decision below conflicts with *Currin v. Wallace*, 306 U.S. 1 (1939), in that it is not constitutionally problematic to condition an agency's regulation on the assent of the private parties being regulated. Pet. 14-15. But *Currin* involved a scheme where the private parties were given the ability to *opt out* of the exercise of coercive state power; they were not given the ability to *wield* coercive state power over their business competitors. Whereas in *Currin* the regulated parties were allowed to vote whether to subject themselves to the regulation, here the freight railroads were given no choice—the Metrics and Standards were forced upon them. Indeed, this was the very basis upon which the *Currin* Court distinguished *Carter Coal*—that *Currin* did not present a situation where private parties could "make the law and force it upon" other private parties against their will. 306 U.S. at 15. Of course, that is exactly what happened here.[2]

The Government also claims a conflict with *Adkins*. Pet. 15. In *Adkins*, however, the private parties merely *proposed* maximum coal prices to the Government, which then decided whether to adopt, modify or reject the proposals. *See* 310 U.S. at 398. That is a classic example of a private entity playing an advisory role. But whereas in *Adkins* the Government could simply have rejected the private par-

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[2] *United States v. Rock Royal Co-Op.*, 307 U.S. 533 (1939), is distinguishable for the same reason: it involves waiver of a Government-drafted regulation by the regulated parties themselves.

ties' advisory proposal and set its own prices, the FRA could not do that here. Amtrak could block the FRA's proposal and the private party's wishes would trump the Government's.

2. The arbitration provision in Section 207 only worsens the nondelegation problem. That provision grants Amtrak the right—in the event the FRA refuses to bend to Amtrak's demands in the joint rulemaking—to outsource the rulemaking to "binding arbitration" in which the regulations would be written by an unspecified arbitrator appointed by the Surface Transportation Board.

As the D.C. Circuit recognized, empowering a private arbitrator to override the Government's proposed regulation and replace it with one of the arbitrator's own choosing is a plain violation of the nondelegation principle. It is beyond debate that private arbitrators may not enact federal laws or regulations over the Government's opposition, yet that is precisely what Section 207 authorizes. By giving Amtrak the power to block the rulemaking—or to bring in a private, third-party arbitrator to write the rule over the Government's objections—Section 207 forces a federal agency to compromise with a private party about what the law should be. At a minimum, Amtrak could use its delegated power as leverage to extract concessions from the Government in the rulemaking by threatening to veto the Government's preferred rule, or to refer the entire rulemaking to a private arbitrator who might force the Government to accept a rule it did not want.

The Government contends that, to avoid constitutional concerns, Section 207(d) should be construed as requiring the appointment of a Government arbitrator. Pet. 17 n.7. But of course the statute itself

does not say this, and as the court of appeals pointed out, "[t]he constitutional avoidance canon is an interpretive aid, not an invitation to rewrite statutes to satisfy constitutional strictures." Pet. App. 15a n.7 (citing *Reno v. ACLU*, 521 U.S. 844, 884-85 (1997)); *see also United States v. Stevens*, 559 U.S. 460, 481 (2010) (the Court "will not rewrite a law to conform it to constitutional requirements") (internal quotation marks and alteration omitted).

3. The Government attempts to cure these constitutional shortcomings by arguing that any future sanctions against the railroads would be based on violations of the statutory preference requirement rather than the Metrics and Standards themselves. *See* Pet. 18-19 (citing 49 U.S.C. § 24308(c) (requiring carriers to give preference to Amtrak over freight traffic)). The D.C. Circuit expressed confusion when the Government made this argument below, *see* Pet. App. 11a ("[w]e are not entirely certain what to make of this argument"), and the Government offers this Court no additional insight.

If the Government means to argue that the Metrics and Standards have no direct impact on the freight railroads, that would be wrong. The freight railroads submitted unrebutted evidence documenting the many steps they have taken in order to satisfy the Metrics and Standards. *See* Pet. App. 11a n.6 ("The record is replete with affidavits from the freight railroads describing the immediate actions the metrics and standards have forced them to take."). If the Government means to argue that the involvement of the Surface Transportation Board in enforcing the preference requirement cures any nondelegation problem, that would also be wrong. The Board had no authority over the promulgation of the

Metrics and Standards, and has no role with regard to a key element of the statutory scheme: the requirement in Section 207(c) that the freight railroads amend their contracts with Amtrak to incorporate the Metrics and Standards. In any event, the Constitution does not permit Congress to vest a private party with rulemaking authority on the theory that a federal agency may someday resolve disputes arising under those rules.

B. Section 207 Also Violates Due Process.

Section 207 also violates the Due Process Clause because the Government has granted Amtrak regulatory authority over the very industry where it is a market participant trying to make a profit. Although the D.C. Circuit did not need to reach respondent's due process challenge, *see* Pet. App. 23a, it provides further confirmation that the court's decision is correct and does not warrant review.[3]

Neither Government officials nor corporations vested with Governmental authority may issue regulations when they have a commercial self-interest in the subject of the regulation. This ensures that Government power is exercised in a neutral and disinterested manner and not for the private economic benefit of the regulator. In *Carter Coal*, the Court held that granting a corporation "the power to regu-

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[3] Even the Government's *amicus* agrees that Section 207 violates due process. *See* Sasha Volokh, *My Amicus Cert Petition*, www.washingtonpost.com (Apr. 11, 2014) ("My view is that this delegation violates due process, not non-delegation, so the D.C. Circuit got it right for the wrong reason.").

late the business of another, and especially of a competitor," is "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment." 298 U.S. at 311-12 (collecting cases). A regulator must be "presumptively disinterested," *id.* at 311, and it should be self-evident that a for-profit corporation cannot simultaneously regulate the same industry where it is seeking to make a profit as a commercial actor. *See id.* (describing as "fundamental" the "difference between producing [a good or service] and regulating" it).

The Court has reaffirmed this basic due process principle in similar contexts, making clear that entities wielding Government power must be disinterested such that private self-interest does not influence the discharge of a public duty. In *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), for example, the Court held that partiality is forbidden in the exercise of sovereign authority, and warned of the mere "*potential* for private interest to influence the discharge of public duty." *Id.* at 805 (emphasis in original). Likewise, in *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973), the Court held that due process is violated when individuals wield Government authority in an area where they have private pecuniary interests.

Section 207 violates the Due Process Clause because Amtrak has a direct commercial interest in the substance of its regulations and has no obligation to adopt regulations that are in the public interest. The same Amtrak directors who were granted regulatory authority over the industry in which they are market participants are required by federal law to make decisions in a way that maximizes Amtrak's profits. *See* 49 U.S.C. § 24301(a)(2). Indeed, Congress has

directed Amtrak not to conduct itself like a neutral and disinterested regulatory agency, but rather to "use its best business judgment" in generating profit for Amtrak by "improving its contracts with operating rail carriers," and by "undertak[ing] initiatives . . . designed to maximize [Amtrak's] revenues." 49 U.S.C. § 24101(c)-(d). Amtrak operated under a similar mandate when exercising its regulatory authority under PRIIA: Congress provided that one of PRIIA's objectives was "to increase [Amtrak's] profitability." PRIIA § 228(a)(14). The potential for financial self-interest affecting the regulatory decisions of Amtrak directors is not just theoretical—it is mandated by federal law.

In addition to the statutory mandate, Amtrak's directors have a fiduciary duty to maximize corporate profits. They are not disinterested government employees running a regulatory agency, but rather are individuals engaged in a commercial enterprise—operating a for-profit passenger railroad on the same tracks used by the freight railroads. Amtrak therefore had every incentive to draft the Metrics and Standards in a way favorable to Amtrak and unfavorable to the freight railroads. Indeed, the Government admitted in the district court that Amtrak had the incentive to engage in biased rulemaking, but argued that the FRA's involvement "*decreased* Amtrak's desire to act in a biased fashion." JA 3 (Gov't MSJ Opp., District Court Docket Entry 10, at 4 (emphasis added)). Of course, regulators exercising Government power should have no bias—not just a "decreased" bias—and the Government cited no authority for the obviously incorrect proposition that any danger of bias is eliminated if a decision is made jointly by a biased decisionmaker and an unbiased decisionmaker. *Cf. Caperton v. A.T. Massey Coal*

Co., 556 U.S. 868, 872, 879 (2009) (single biased judge taints entire panel).

Amtrak has stated that it expects the freight railroads to amend their operating agreements pursuant to Section 207(c) by incorporating the Metrics and Standards. JA 275-76. But due process does not permit Congress to launch Amtrak into the marketplace to negotiate contracts with the freight railroads in its role as a private corporation, then empower Amtrak to assume the mantle of a Government regulator and seek to amend those contracts—contracts that the Government itself has described as "private agreements among private parties." JA 151; *see also Atchison*, 470 U.S. at 470 (contracts between freight railroads and Amtrak "are contracts not between the railroads and the United States but simply between the railroads and the nongovernmental corporation, Amtrak"). Due process forbids Congress from empowering Amtrak to achieve through regulatory fiat what it could not achieve through negotiation.[4]

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[4] The Government suggests that respondent's due process argument depends on a determination that Amtrak is a private actor. Pet. 7-8. Not so. Respondent's due process claim was framed broadly. *See* JA 21 (complaint alleging that "Section 207 of PRIIA violates the due process rights of the freight railroads because it purports to empower Amtrak to wield legislative and rulemaking power to enhance its commercial position at the expense of other industry participants"). As the D.C. Circuit recognized, AAR's "complaint asserted . . . that empowering Amtrak to regulate its competitors violates the Fifth Amendment's Due Process Clause." Pet. App. 6a (citing Compl. ¶¶ 47-54, at 16-17); *id.* at 23a (noting "AAR's separate argument that Amtrak's involvement in developing the metrics and standards deprived its members of due process"). Respondent has always argued that Section 207 violates due process under *Carter Coal*, which prohibits rulemaking by a self-interested

C. Amtrak Is Not The Government.

The Government contends that the decision below is "inconsistent" with *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), because the D.C. Circuit should have treated Amtrak as a Government entity. Pet. 20-24. This argument provides no basis for review, as the Government did not press its *Lebron* claim before the court of appeals. In fact, the D.C. Circuit commented on the Government's "[s]trange[ ]" failure to do so, concluding that "[p]erhaps this indicates the government's agreement with AAR's reading of [*Lebron*]." Pet. App. 20a n.8.

Even if the Government had preserved the argument, it is meritless. *Lebron* does not hold that Amtrak may exercise the sovereign authority of the United States by promulgating federal regulations. *Lebron* involved an artist who wished to install a politically controversial display in New York's Penn Station. When Amtrak prohibited the installation, the artist sued Amtrak for violating his First Amendment rights. The Court allowed the lawsuit to proceed, holding that Amtrak must be deemed the Government "for the purpose of individual rights guaranteed against the Government by the Constitution." 513 U.S. at 394.

As the D.C. Circuit correctly recognized, "*Lebron*'s holding was comparatively narrow, deciding only that Amtrak is an agency of the United States for the purpose of the First Amendment." Pet. App. 21a-

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[Footnote continued from previous page]

rulemaker—regardless of whether the rulemaking entity is public, private, or something in between.

22a. "It did not opine on Amtrak's status with respect to the federal government's structural powers under the Constitution—the issue here." *Id.* at 22a. In fact, the *Lebron* Court strongly suggested that while Amtrak is part of the Government for purposes of the constitutional obligations of the Government—such as the obligation to respect an artist's First Amendment rights—Amtrak is *not* part of the Government for purposes of the inherent powers and privileges of the Government. *See* 513 U.S. at 398-99.

Deeming Amtrak the Government for rulemaking purposes would have many troubling consequences. For one thing, Amtrak—unlike every other federal agency—would be able to exercise rulemaking power freed from the constraints of the Administrative Procedure Act and its many procedural protections, such as notice-and-comment requirements and the prohibition on arbitrary and capricious agency action. *See Lebron*, 513 U.S. at 392 (observing that Amtrak is not subject "to statutes that impose obligations . . . upon Government entities, such as the Administrative Procedure Act"). Moreover, Congress could delegate regulatory authority to Amtrak to exercise in its own right, without the involvement of any federal agency, and Amtrak could exercise this power free of any APA constraints, making Amtrak a more powerful rulemaking body than the Department of Transportation itself.

Treating Amtrak as the Government for rulemaking purposes would also call into question Amtrak's structure under the Appointments Clause. "[R]ulemaking" power may properly "be exercised only by 'Officers of the United States,' appointed in conformity with" the Clause. *Buckley v. Valeo*, 424 U.S.

1, 140-43 (1976) (per curiam). The President of Amtrak (who serves as a member of Amtrak's Board) is appointed not by the President of the United States, however, but by the other eight Board Members. *See* 49 U.S.C. § 24302(a)(1)(B); *id.* § 24303(a).

The Government contends that the D.C. Circuit did not give sufficient weight to what it calls Amtrak's "host of ties" to the Government, noting that Amtrak receives federal subsidies and most of its Board members are presidentially appointed. Pet. 22-24. But *Carter Coal* and *Adkins* prohibit delegations to private companies, period. They do not permit delegations to private companies that are subsidized by the Government or over which the Government exercises some degree of influence through its power to fund or to make appointments.

Moreover, the suggestion that the Government exercises sufficient influence over Amtrak's day-to-day operations to enable it to exercise Article I lawmaking power is belied by the fact that "Amtrak's day-to-day operations are *not* subject to close government supervision," and "[t]he officers and employees who conduct Amtrak's day-to-day affairs are not federal employees." *Ehm v. Nat'l R.R. Passenger Corp.*, 732 F.2d 1250, 1255 (5th Cir. 1984) (emphasis added). Any Government official who attempted to direct Amtrak as to how it should conduct the rulemaking would arguably be violating federal law, which prohibits treating Amtrak as an "instrumentality" or "agency" of the Government. *See* 49 U.S.C. § 24301(a)(3). In fact, PRIIA itself recognizes that Amtrak officials are not subject to Government orders in conducting the rulemaking. The dispute-resolution provision giving an arbitrator the power to draft the rule in the event Amtrak and the FRA can-

not agree would be completely unnecessary if the Government controlled Amtrak's rulemaking efforts. *See* PRIIA § 207(d).

A key purpose of the prohibition on delegation to private entities is preventing "the harm done thereby to principles of political accountability." *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143 n.41 (1984). When power is delegated outside the federal government, the lines of accountability are blurred, and Congress is able to diffuse responsibility for the formulation of policy, undermining an important democratic check on government decisionmaking. *See Free Enter. Fund*, 130 S. Ct. at 3155 ("Without a clear and effective chain of command, the public cannot determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.") (internal quotation marks omitted). Here, Congress, the President and Amtrak itself have all publicly and emphatically denied that Amtrak is part of the Government. Congress has provided in the U.S. Code that Amtrak "is not a department, agency, or instrumentality of the United States Government." 49 U.S.C. § 24301(a)(3). The President has also publicly denied accountability for Amtrak, stating that "Amtrak is not an agency or instrument of the U.S. Government." Executive Office of the President, OMB, Budget of the U.S. Government (FY 2013), at 1014. And Amtrak itself repeatedly proclaims on its website that "Amtrak is a private corporation and not a federal agency." *See* www.amtrak.com, not www.amtrak.gov.

As the D.C. Circuit correctly concluded, "delegating the government's powers to private parties saps our political system of democratic accountability,"

and "[t]his threat is particularly dangerous where both Congress and the Executive can deflect blame for unpopular policies by attributing them to the choices of a private entity." Pet. App. 18a. Here, there is diminished public accountability for the exercise of Government lawmaking power under Section 207—because Amtrak and the Government have repeatedly told the public in the plainest possible terms that Amtrak is not part of the Government.

II. THE DECISION BELOW DOES NOT WARRANT PLENARY REVIEW.

The Government makes almost no effort to explain why this case warrants review under the Court's usual criteria. The petition concedes the absence of a circuit split. *See* Pet. 24 (arguing review is warranted "even in the absence of a circuit split"). And as demonstrated above, the D.C. Circuit faithfully applied this Court's nondelegation jurisprudence.

The Government defaults almost completely on its obligation to demonstrate the importance of the question presented. It does not argue, for example, that the D.C. Circuit's decision will have a broader impact beyond the confines of this litigation. Nor does it contend that the ruling below may call into question the constitutionality of other statutes. The D.C. Circuit invalidated a unique, Amtrak-specific delegation of a type that does not appear elsewhere in federal law. In fact, in the Government's view, the Metrics and Standards do not matter very much because the freight railroads' obligations are defined by the statutory preference requirement. Pet. 18.

The D.C. Circuit did not hold that Congress lacks the power to delegate authority to set performance standards for Amtrak; it merely invalidated the par-

ticular scheme established in PRIIA § 207. The Government does not explain why Congress's goals can only be achieved by vesting Amtrak with co-equal legislative authority. Forbidding this particular type of delegation would not unduly restrict Congress in achieving its legislative objectives, and the Government does not even make this claim. Indeed, Congress could achieve its goals consistently with the Constitution simply by giving Amtrak an *advisory* role in the rulemaking process, as it has done in other statutes. The Government does not argue that congressional power has been meaningfully restricted by the ruling below, and has not demonstrated significant harm to a federal program or objective.

The Government nevertheless seems to assume that this Court automatically grants review any time a lower court holds any portion of a federal statute unconstitutional, no matter how insignificant. That is not this Court's practice. For example, in *Beer v. United States*, 696 F.3d 1174, 1186 (Fed. Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 1997 (2013), after the Federal Circuit held that four federal statutes blocking salary increases for federal judges and other high-level officials were unconstitutional under the Compensation Clause, the Government petitioned for review in this Court. Just as in this case, the United States argued that *Beer* "presents issues of exceptional importance," and observed that "this Court has often reviewed lower-court decisions holding that a federal statute is unconstitutional, even in the absence of a circuit conflict." Pet. in No. 12-801, 2013 WL 51969, at 27 (filed Jan. 3, 2013). The Court nonetheless denied certiorari. Likewise, in *ACLU v. Mukasey*, 534 F.3d 181, 207 (3d Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009), the Third Circuit held that the Child Online Protection Act violated the

First and Fifth Amendments. The Court denied certiorari notwithstanding the Government's argument that the lower court's "decision renders an important Act of Congress a nullity" and "clearly warrants this Court's review." Pet. in No. 08-565, 2008 WL 4753025, at 18 (filed Oct. 29, 2008).[5]

In sum, the D.C. Circuit invalidated a unique, Amtrak-specific delegation of a type that is not replicated elsewhere in federal law, appears to be wholly unprecedented, serves no important federal purpose, and relates to regulations that the Government itself argues are insignificant. This Court should deny review.

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[5] There are many other examples of this Court's denying certiorari in cases where the court below struck down a federal statute as unconstitutional. *See, e.g.*, *ACORN v. Edwards*, 81 F.3d 1387 (5th Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997); *Hechinger v. Metro. Wash. Airports Auth.*, 36 F.3d 97 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Action for Children's Television v. FCC*, 932 F.2d 1504, 1509 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 914 (1992); *Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

No. 13-1080

In the Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

ASSOCIATION OF AMERICAN RAILROADS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The court of appeals has held a federal statutory provision unconstitutional because it requires the Federal Railroad Administration (FRA) to work jointly with the National Railroad Passenger Corporation (Amtrak)—a government-created, government-controlled, and government-subsidized corporation—when developing the metrics and standards that are used to measure Amtrak's own performance. In the court's (and respondent's) view, that constitutes an impermissible delegation of "regulatory" authority to a "private" entity. See Pet. App. 8a-9a; Br. in Opp. 15. But this Court has sustained the constitutionality of statutes that provided that even truly private entities must approve or propose even truly regulatory measures. The authority here, however, is not regulatory. And, in any event, Amtrak is not a private entity for purposes of the constitutional analysis here. The

decision below warrants this Court's review and reversal.

A. The Government's Control Over The Development And Application Of The Amtrak-Performance Metrics And Standards Avoided Nondelegation Concerns

Section 207(a) of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Pub. L. No. 110-432, Div. B, 122 Stat. 4907, provided that the FRA and Amtrak "shall jointly * * * develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations." 49 U.S.C. 24101 note.[1] As explained in the certiorari petition (at 5), the resulting metrics and standards were to be used by Amtrak for various internal purposes and to be incorporated, "[t]o the extent practicable," into the "access and service agreements" between Amtrak and the rail carriers whose tracks Amtrak uses. 49 U.S.C. 24101 note (PRIIA § 207(c)). The PRIIA also provided that a sustained failure by Amtrak to meet the standards governing its own performance could play a role in triggering an investigation by the Surface Transportation Board (STB) into whether a freight railroad (such as one of the railroads represented by respondent) had violated the independent and long-standing statutory requirement that Amtrak's passenger trains be given "preference over freight transportation in using a rail line, junction, or crossing." 49 U.S.C. 24308(c) and (f)(1); see Pet. 3, 5-6. Those statutorily prescribed mechanisms for developing and applying the Amtrak-

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[1] All citations to Title 49 of the United States Code in this reply brief reflect the 2006 volume and any amendments shown in the 2011 supplement.

performance metrics and standards do not violate constitutional nondelegation principles. See Pet. 12-20.

1. Respondent contends (Br. in Opp. 13-14) that the applicable strand of the nondelegation doctrine prevents Congress from allowing a private entity to serve "more than a 'ministerial' or 'advisory' role in the exercise of Government power." In respondent's view, that limitation was exceeded because Section 207(a) permitted Amtrak to "veto the FRA's preferred approach." *Id.* at 15.

As the petition has already explained (at 14), however, this Court has previously approved statutory schemes under which regulatory standards were subject to private parties' veto powers. See *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, 547-548, 577-578 (1939); *Currin* v. *Wallace*, 306 U.S. 1, 6, 15-16 (1939). Respondent seeks (Br. in Opp. 17) to distinguish those cases as ones in which "private parties were given the ability to *opt out* of the exercise of coercive state power" but not "to *wield* coercive state power over their business competitors." But that mistakes the circumstances of both cases, where the relevant rules could not become effective without the agreement of a certain portion of an industry group (tobacco growers in a local market in *Currin* and milk producers in a marketing area in *Rock Royal Co-operative*). Pet. 14. In each case, the regulatory provisions or prices to which an industry super-majority agreed had precisely the effect of binding business competitors who had not consented. Thus, in *Rock Royal Co-operative*, "[v]igorous campaigns were waged by both proponents and opponents of the [Secretary of Agriculture's] Order," which provided

"[c]ompetitive advantages to co-operatives." 307 U.S. at 556-557. When less than 50% of affected milk handlers agreed to the Secretary's price-fixing order, the order was nevertheless allowed to go into effect because three-quarters (*i.e.*, more than the requisite two-thirds) of affected milk producers "approved its terms." *Id.* at 559, 577. And in *Currin*, some North Carolina tobacco growers desired to sell at a local market that was subject to a federal inspection-and-certification regime, while others did not; and the warehousemen in the markets that were subject to the federal regime "compet[ed] for patronage among the same growers" with the warehousemen in other markets in the State that were exempt from that regime. 306 U.S. at 8-9, 13, 19. There is accordingly no basis for respondent's contention that Amtrak is the first entity authorized to exercise a veto power over a federal standard that could affect other market participants.[2]

2. Respondent also errs in describing (Br. in Opp. 14) Amtrak and the FRA "as co-equal partners" in promulgating the Amtrak-performance metrics and standards. As explained in the petition (at 17), Amtrak was ultimately not an equal partner, because any disagreement it had with the FRA would have been resolved by a *government-appointed* arbitrator. 49

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[2] As respondent concedes (Br. in Opp. 15), Amtrak is not really a direct competitor with the freight railroads. Amtrak assumed the passenger-rail-service obligations that other railroads abandoned; in return, the freight railroads are statutorily required to allow Amtrak to use their facilities at rates either agreed to by Amtrak and the host railroads or prescribed by the STB. See 49 U.S.C. 24308(a); *National R.R. Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 453-456 (1985).

U.S.C. 24101 note (PRIIA § 207(d)). And, if a private-party arbitrator would present constitutional concerns, then principles of constitutional avoidance would counsel in favor of reading the (never-used) provision as authorizing the STB to appoint only a government arbitrator. Like the court of appeals (Pet. App. 14a-15a), respondent seizes (Br. in Opp. 18-19) on the fact that the statutory text does not *forbid* such an arbitrator from being a private party. But the government-arbitrator reading is a "plausible interpretation[]" of the text. *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005). And, even if the statute did not have to be construed in that fashion, the STB still could have appointed a government arbitrator.

3. Respondent also exaggerates the reach of the Amtrak-performance metrics and standards, characterizing (Br. in Opp. 16) them as "regulations that require the freight railroads to modify their operations and delay freight traffic in order to benefit Amtrak's for-profit business." In fact, as explained in the petition (at 18), "the metrics and standards serve primarily as tools to measure Amtrak's own performance, not to alter freight railroads' legal rights or obligations." Amtrak's own failure to meet its standards may trigger an STB investigation into a freight railroad's actions affecting Amtrak, 49 U.S.C. 24308(f)(1), but that investigation will not be about the standards. Instead, any sanction imposed on a freight railroad will only be the result of the STB's determination that the freight railroad failed to satisfy the long-standing statutory-preference requirement, which is independent of the metrics and standards. See 49 U.S.C. 24308(f)(2); Pet. 6. In other words, Amtrak's supposed "competitive advantage" (Br. in Opp. 16) over the freight railroads

with respect to the use of railroad tracks inheres in Congress's own prescription—which respondent does not challenge—and not in the performance standards jointly developed by the FRA and Amtrak.

Similarly, respondent errs in contending (Br. in Opp. 16) that Section 207(c) of the PRIIA allows Amtrak to use the performance standards "to pressure the freight railroads to rewrite [their] contracts" with Amtrak. Section 207(c) provides that the metrics and standards shall be incorporated into the access and service agreements between Amtrak and host railroads "[t]o the extent *practicable*." 49 U.S.C. 24101 note (emphasis added). The statute provides no penalty for failure to incorporate the metrics and standards. And, to the extent that Amtrak and a host railroad cannot agree on terms, then the STB shall "prescribe reasonable terms and compensation." 49 U.S.C. 24308(a)(2). Thus, it is the STB, not Amtrak, that determines what terms are reasonable if a host railroad and Amtrak do not agree.

B. Amtrak Is Not A Private Entity For Purposes Of Nondelegation Analysis

The court of appeals further erred in holding that Amtrak is merely "a private corporation" for purposes of nondelegation analysis. Pet. App. 23a. Respondent does not dispute the petition's explanation of the many means of control that the federal government exercises over Amtrak, including Congress's establishment of Amtrak's goals, the President's appointment of eight of the nine members of Amtrak's Board of Directors (who then collectively appoint the ninth member), the government's ownership of the overwhelming majority of Amtrak's stock, and Congress's routine appropria-

tion of more than a billion dollars of annual subsidies. Pet. 22-23.

Instead, respondent emphasizes that Congress and the Executive Branch have said that Amtrak "is not a department, agency, or instrumentality of the United States." Br. in Opp. i, 27 (quoting 49 U.S.C. 24301(a)(3)). But, as this Court has explained, those declarations are "dispositive of Amtrak's status as a Government [or non-Government] entity for purposes of matters that are within Congress's control—for example, whether it is subject to statutes." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995); see also *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3148 (2010) (relying on *Lebron*'s distinction between statutory and constitutional matters for purposes of Appointments Clause and separation-of-powers challenges). The applicability of the nondelegation doctrine is a constitutional question, not a matter within Congress's control.[3] Accordingly, even assuming *arguendo* that the

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[3] Respondent asserts (Br. in Opp. 24) that the government failed to preserve "its *Lebron* claim before the court of appeals." But reliance on *Lebron* is not a "claim" that can be waived in that fashion. Indeed, in *Lebron* itself, the Court held that whether Amtrak "is part of the Government" was "not a new claim," but merely "a new argument," which was closely related to an argument based on the close ties between Amtrak and the United States. 513 U.S. at 379-380 & n.1; cf. *Yee* v. *City of Escondido*, 503 U.S. 519, 534-535 (1992). In any event, the government's brief in the court of appeals did invoke *Lebron* for the propositions that Amtrak is "uniquely linked to the federal government," Gov't C.A. Br. 18; that Amtrak is subject to "significant structural control" by the government, *id.* at 29-30; and that "'it is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of

nature of the Amtrak-performance metrics and standards, when combined with the FRA's involvement in their promulgation and the STB's exclusive enforcement role, would preclude a private entity's participation in their development, Amtrak is not "private" in the relevant sense.

C. This Court Should Not Address In The First Instance Respondent's Alternative Claim

Respondent contends (Br. in Opp. 20) that the second claim in its complaint—that Section 207 of the PRIIA violates the Due Process Clause—provides "further confirmation that the [court of appeals'] decision is correct." The court of appeals, however, declined to address that "separate argument." Pet. App. 23a. To the extent that respondent nevertheless suggests (Br. in Opp. i) that a due-process question should be added along with any grant of certiorari, this Court should decline that suggestion.[4]

As the Court often observes, it is "a court of final review and not first view," and it therefore does not ordinarily "decide in the first instance issues not decided below." *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) (citations omitted). That practice carries special force in the context of constitutional questions that have not been addressed by the court of appeals. See, *e.g.*, *ibid.*; *Bond* v. *United States*, 131 S. Ct. 2355, 2360, 2367 (2011); *FCC* v. *Fox Television Stations*,

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citizens affected by its actions,'" *id.* at 30 n.3 (quoting *Lebron*, 513 U.S. at 392).

[4] Professor Alexander Volokh's amicus brief contends (at 11) that "[d]ue process is a better avenue" than the nondelegation doctrine "for scrutinizing delegation to private parties," but it supports (at 1-2, 14) a remand for consideration by the court of appeals rather than a decision on that ground by this Court.

Inc., 556 U.S. 502, 529 (2009); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Adhering to that general practice would be particularly appropriate here, because the basis for respondent's alternative constitutional argument has markedly shifted since it was rejected by the district court. The district court held that respondent's due-process claim lacks merit because, for purposes of the Due Process Clause, Amtrak, is a "governmental entity" rather than a "private entity." Pet. App. 34a-35a. Respondent now contends (Br. in Opp. 23 n.4) that its due-process claim does not "depend[] on a determination that Amtrak is a private actor," because the claim "was framed broadly" in its complaint. To that end, respondent quotes one sentence of its complaint, which said "Section 207 of PRIIA violates the due process rights of the freight railroads" by vesting power in Amtrak. *Ibid.* (quoting C.A. App. 21 (Compl. ¶ 54)). While that sentence did not specify whether Amtrak was a government or private entity, the preceding sentence in the complaint articulated the legal rule respondent invoked, making it clear that the due-process claim was predicated on Amtrak's purported status as a private party. C.A. App. 21 (Compl. ¶ 53) ("Vesting the coercive power of the government in interested *private parties* violates the due process rights of regulated third parties, as secured by the Fifth Amendment to the United States Constitution.") (emphasis added). Both of the briefs that respondent filed in the district court at the summary-judgment stage also stated the applicable legal principle in terms involving "private" parties.[5]

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[5] See Resp. Mem. in Supp. of Its Mot. for Summ. J. 32, D. Ct. Doc. 8 (Dec. 2, 2011) ("Delegations to private parties are unconsti-

Accordingly, if this Court were to grant review and reverse the court of appeals' holding with respect to respondent's nondelegation claim, the next appropriate step would not be to consider the current iteration of respondent's due-process claim in the first instance, but instead to remand for further proceedings in which respondent could pursue any claim, apart from the nondelegation claim, that it has preserved. See *United States* v. *Comstock*, 560 U.S. 126, 149-150 (2010) (reversing court of appeals' holding that a federal statute violated the Necessary and Proper Clause; declining to reach other constitutional claims; noting that the respondents could pursue on remand any other claims they had preserved). The court of appeals could then consider any such claim in light of the Court's analysis of the operation of Section 207 and its consideration of Amtrak's status and the nondelegation issue.

D. The Court Of Appeals' Invalidation Of A Federal Statutory Provision On Nondelegation Grounds Warrants This Court's Review

As noted in the petition (at 24), this Court's general practice is to review decisions that hold federal statutes unconstitutional, especially when review is sought

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tutional for the additional and independent reason that such delegations violate the due process rights of regulated third parties."); Resp. Reply in Supp. of Its Mot. for Summ. J. & Opp. to Pet. Mot. for Summ. J. 26, D. Ct. Doc. 13 (Mar. 6, 2012) ("The Supreme Court has held that granting a private corporation 'the power to regulate the business of another, and especially of a competitor' is 'clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment.'") (quoting *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311-312 (1936)); see also Pet. App. 41a (district court decision noting that respondent's due-process claim is premised on Amtrak's private status).

by the United States. Such review is appropriate where, as here, the court of appeals has relied upon principles that this Court has not invoked to invalidate an Act of Congress in almost 80 years, and it has done so in a manner that is inconsistent with this Court's subsequent cases. Moreover, in this instance, there will be no further percolation of the question in the lower courts, and, under respondent's view, the decision below not only requires the Amtrak-performance metrics and standards to be vacated, but also requires the nullification of all actions that the FRA and the Department of Transportation have taken pursuant to them since 2010. Pet. 8, 25. This Court should grant review to prevent such needless disruption of Congress's important efforts to provide for the improvement of passenger-rail service in the United States.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MAY 2014

AMICUS CURIAE BRIEF

No. 13-1080

IN THE
Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.
Petitioners,

v.

ASSOCIATION OF AMERICAN RAILROADS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Colombia Circuit

BRIEF OF PROFESSOR ALEXANDER VOLOKH AS *AMICUS CURIAE* IN SUPPORT OF PETTTIONERS

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QUESTIONS PRESENTED

The question presented by the Government is as follows:

1. Section 207(a) of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, Div. B, 122 Stat. 4916, requires that the Federal Railroad Administration (FRA) and Amtrak "jointly * * * develop" the metrics and standards for Amtrak's performance that will be used in part to determine whether the Surface Transportation Board (STB) will investigate a freight railroad for failing to provide the preference for Amtrak's passenger trains that is required by 49 U.S.C. 24308(c) (Supp. V 2011). In the event that the FRA and Amtrak cannot agree on the metrics and standards within 180 days, Section 207(d) of the Act provides for the STB to "appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." 122 Stat. 4917. The question presented is whether Section 207 effects an unconstitutional delegation of legislative power to a private entity.

Amicus proposes that the following question be added:

2. Whether Congress's grant of regulatory authority to Amtrak should be analyzed under the Fifth Amendment's Due Process Clause, rather than under a private delegation doctrine having no basis in this Court's precedent.

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INTEREST OF THE *AMICUS CURIAE*[1]

Alexander "Sasha" Volokh is an associate professor at Emory Law School. He teaches, writes, and blogs about constitutional law, administrative law, and legal issues related to privatization, and he has an interest in the sound development of these fields. His critique of the D.C. Circuit's reasoning in this case is forthcoming in the HARVARD JOURNAL OF LAW AND PUBLIC POLICY.

SUMMARY OF THE ARGUMENT

In the case below, the D.C. Circuit held that federal lawmakers could not delegate regulatory authority in any form to private entities. In doing so, it created a private delegation doctrine with no basis in this Court's precedent, muddled the constitutional private–public distinction, and left unanswered an important due process question. This Court should vacate the decision below and remand with

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[1] The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk of the Court in conjunction with the certificate of service. Counsel of record for all parties received notice at least 10 days before the due date of amicus curiae's intention to file this brief. No person other than amicus and his counsel made a monetary contribution to its preparation or submission. No counsel for a party authored the brief in whole or in part.

instructions to consider Respondent's Due Process Clause argument.

By holding that even the provision of an intelligible principle was insufficient to sustain Congress's grant of authority to Amtrak, the D.C. Circuit misstated this Court's holdings in *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), and *Currin v. Wallace*, 306 U.S. 1 (1939).

Rather than adopting a per se rule against delegation to private parties via the non-delegation doctrine, this Court has analyzed Congress's grants of authority to private entities under "the due process clause of the Fifth Amendment." *Carter Coal*, 298 U.S. at 311.

This Court has determined that Amtrak is a state actor for constitutional purposes, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), which implies that it is bound by the Due Process Clause. Even if *Lebron* does not control this case, Amtrak's actions under Section 207 of the Passenger Railroad Investment and Improvement Act of 2008 are quintessential examples of state action. The D.C. Circuit's holding, that Amtrak can be private for non-delegation purposes but a state actor for First Amendment purposes, *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 721 F.3d 666, 677 (D.C. Cir. 2013), needlessly creates two different tests for the private–public distinction where one would suffice.

Analyzing grants of regulatory authority to private entities under the Due Process Clause better

protects accountability for three reasons. First, it is incorporated against the states through the Fourteenth Amendment. Second, it preserves the availability of a damages action for injured parties. Third, it has consistently been applied to issues of bias or fairness.

ARGUMENT

I. The D.C. Circuit's private delegation doctrine finds no support in this Court's precedent.

Limits on delegation of Congressional power fall into at least two categories: (1) the non-delegation doctrine, derived from the Vesting Clause of Article I; and (2) due process limits on delegation of regulatory authority, derived from the Fifth Amendment, which generally prohibit unfair treatment. Contrary to the D.C. Circuit's holding, the non-delegation doctrine does not distinguish between private and public actors. A delegation of regulatory power to a biased party may implicate the Due Process Clause, but does not violate the non-delegation doctrine if circumscribed by an intelligible principle.

A. The non-delegation doctrine does not distinguish between private and public actors.

The non-delegation doctrine is derived from the Vesting Clause of Article I, Section 1 of the U.S. Constitution. *Mistretta v. United States*, 488 U.S. 361, 373 (1989). Rooted in separation of powers

principles, the non-delegation doctrine prohibits Congress from delegating its legislative power. *Id.*

To prevent the delegation of any power from becoming a forbidden delegation of *legislative* power, Congress must provide an "intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Id.* This Court has found only two cases where such a requisite intelligible principle was lacking: *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp v. United States*, 295 U.S. 495 (1935). *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (identifying *Panama* and *Schechter* as the only two such cases "[i]n the history of the Court.").

In *Panama*, the statute provided literally no guidance. As the Court wrote: "Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the [regulated activity] is to be allowed or prohibited." *Panama*, 293 U.S. at 430. In *Schechter*, the statute "conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Am. Trucking Ass'ns*, 531 U.S. at 474 (citing *Schechter*, 295 U.S. at 495).

By contrast, delegations have been upheld where the intelligible principle was no more specific than that broadcast licenses be awarded in the "public interest," that prices be set at "fair and equitable"

levels, and that the structure of holding companies be modified so as not to be "unduly and excessively complicate[d]." *Id.* at 474 (citing *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943); *Yakus v. United States*, 321 U.S. 414, 420, 423–26 (1944); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946)). The non-delegation cases show that the requirements for satisfying the intelligible principle are quite low.

The question before the Court is whether the statute authorizing Amtrak to act as co-equal with the FRA offers the requisite minimal intelligible principle to sustain the delegation under the non-delegation doctrine. The statute does provide such a principle: Amtrak "shall be operated and managed as a for-profit corporation." 49 U.S.C. § 24301(a). This principle is intelligible enough to save the Congressional delegation from invalidity.

The D.C. Circuit adopted Respondent's argument that delegation to a private party is a per se violation of the non-delegation doctrine. *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013). This position has no support in this Court's non-delegation cases. To the contrary, this Court upheld a delegation to private parties in *Currin v. Wallace*, 306 U.S. 1 (1939).

Currin concerned a challenge to the Tobacco Inspection Act of 1935. The Act authorized the Secretary of Agriculture to establish uniform standards for tobacco and designate tobacco markets where no tobacco could be sold unless it was

inspected and certified according to those standards. But the Secretary was forbidden from designating a market unless two-thirds of the growers in that market voted in favor of such a designation in a referendum. Industry members thus held an "on-off" power to determine whether predetermined regulations would go into effect. Such a power has often been analyzed under the non-delegation doctrine. *See Cargo of the Brig Aurora v. United States*, 11 U.S. 382, 386 (1813); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 694 (1892); *Panama*, 293 U.S. at 430. In *Currin*, this Court upheld the delegation to the industry members as being no worse than the delegation to the President upheld in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928). Therefore, this Court held, the delegation did "not involve any delegation of legislative authority." *Currin*, 306 U.S. at 15.

The fact that this Court has upheld a delegation to private parties by analogy to a similar delegation to the President—without expressing any reservations based on the private nature of the delegates—proves that the non-delegation doctrine does not distinguish between public and private parties.

B. The D.C. Circuit misconstrued due process cases to support a non-delegation analysis.

The D.C. Circuit purported to find a rule against private delegations in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). *Ass'n of Am. Railroads*, 721 F.3d at

670. But *Carter Coal* was not decided under the non-delegation doctrine.

It is true that, in *Carter Coal*, this Court disapproved a delegation of power to some members of industry to impose regulations on other members of industry. *Carter Coal*, 298 U.S. at 311. This was, the Court held, "legislative delegation in its most obnoxious form, for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Id.* The mere recitation of the word "delegation," however, does not imply an invocation of the non-delegation doctrine. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982) (holding that "delegating a governmental power to religious institutions" implicates the Establishment Clause). In fact, *Carter Coal* stated which part of the Constitution was implicated: "[A] statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is . . . clearly arbitrary, and . . . clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment . . . ." *Carter Coal*, 298 U.S. at 311.

This Court has more recently recognized, on multiple occasions, that *Carter Coal* is a due process case, not a non-delegation doctrine case. *See Mistretta*, 488 U.S. at 373 (listing *Panama* and *Schechter* as the only two cases to strike down statutes under the non-delegation doctrine, and omitting *Carter Coal*); *accord Am. Trucking Ass'ns*,

531 U.S. at 474; *see also Synar v. United States*, 626 F. Supp. 1374, 1383 n.8 (D.D.C. 1986) (Scalia, J.), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986) (stating that, though *Carter Coal* "discussed" the delegation doctrine, the holding of the case "appears to rest primarily upon denial of substantive due process rights").

Thus, while a delegation of regulatory power to a financially interested party may well violate the Due Process Clause, it does not violate the non-delegation doctrine provided an intelligible principle is present. The due process approach finds support in many of this Court's cases. *See, e.g.*, *Eubank v. City of Richmond*, 226 U.S. 137, 144 (1912); *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928); *Carter Coal*, 298 U.S. at 311–312; *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). The private non-delegation approach, however, is not supported by a single case from this Court. And it is the non-delegation approach that the D.C. Circuit explicitly embraced. *Ass'n of Am. Railroads*, 721 F.3d at 670, 677 (refusing to consider Respondent's Due Process argument).

Moreover, despite the D.C. Circuit's statement that the difference between the non-delegation and due process approaches is purely academic, *id.* at 671 n.3, in fact there are substantial differences between the two approaches. Notably, they differ in whether state officials and agencies are also covered and in whether damages are available for successful challengers. These differences are covered further in Part III.

II. Amtrak is a state actor subject to the Due Process Clause.

Under both the Fifth and Fourteenth Amendments, only state action is subject to the limitations imposed by constitutional due process. *Civil Rights Cases*, 109 U.S. 3, 11 (1883). A private entity can engage in state action when it undertakes a function that is traditionally and exclusively done by the state, commonly called a "public function." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974). If it is a state actor, a private entity is subject to the same restrictions as a government entity. This case is properly considered under the Due Process Clause because Amtrak is a state actor.

In spite of this well-developed state action doctrine, the D.C. Circuit unnecessarily created a separate, ad hoc private–public distinction. The D.C. Circuit held that Amtrak was a private corporation that had been given unconstitutional regulatory power. *Ass'n of Am. Railroads*, 721 F.3d at 669. It analyzed the structure, statutory description, operations, and case history of Amtrak. The court concluded that Amtrak was a private corporation because (1) Congress designated it a private corporation; and (2) Congress instructed it to maximize profit. *Id.* at 677. This reasoning is not compelling. This Court has previously held that Amtrak, as a corporation created by the government for the furtherance of governmental objectives, is a government entity for constitutional purposes. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 383 (1995).

In *Lebron*, Amtrak rejected an advertisement based on its policy that it would not display political advertising. This Court concluded that Amtrak was a governmental agency for the purposes of individual rights guaranteed by the Constitution, and therefore was subject to First Amendment restrictions. *Id.* at 399–400 ("We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment").

Because the United States created Amtrak in order to further governmental objectives, it makes no difference that this case arises in a Due Process Clause context rather than a First Amendment context. As this Court has determined that Amtrak is subject to First Amendment restrictions, it follows that the rest of the Bill of Rights applies to Amtrak as well.

Compared to *Lebron*, Amtrak's actions in this case are even more consistent with those actions generally reserved for the government. The Passenger Rail Investment and Improvement Act of 2008 gives Amtrak equal authority with the Federal Railroad Administration to develop performance standards and metrics for quality of passenger train operations. 49 U.S.C § 24101. The creation of regulatory standards is state action typically reserved for government agencies. *See Metropolitan Edison*, 419 U.S. at 352.

Amtrak's proposed standards are consistent with this axiom for two reasons: (1) they were published for public comment, and criticism was reflected in the final version of the metrics and standards—similar to how federal agencies regulate through a notice and comment period; and (2) the STB may impose fines based on failure to comply with specific regulations imposed by Amtrak. Amtrak's equal status with the FRA in imposing national regulations shows Amtrak is a state actor for purposes of analysis under due process.

III. Analyzing Congress's grant of authority to Amtrak under due process would better protect accountability.

Due process is a better avenue for scrutinizing delegation to private parties for three reasons: (1) Unlike the non-delegation doctrine, due process restrictions on delegation apply against the states through the Fourteenth Amendment; (2) by analyzing cases like the instant case under the Due Process Clause rather than the non-delegation doctrine, prevailing plaintiffs will be able to recover damages; and (3) it makes more sense that issues of bias or fairness should be analyzed under due process rather than a principle rooted in separation of powers.

A. Analyzing under the Due Process Clause allows for damages actions.

In civil suits for deprivation of rights, 42 U.S.C. § 1983 gives courts the ability to award damages when

a plaintiff brings a proper cause of action for violation of constitutional rights by the State. For federal violations of constitutional rights, a remedy is available under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 391 (1971). The protection afforded in *Bivens* was specifically extended to violations of due process under the Fifth Amendment in *Davis v. Passman*, 442 U.S. 228 (1979).

By making a remedy available, both § 1983 and *Bivens* are consistent with the principle that "the very essence of civil liberty . . . [is] the right of every individual to claim the protection of the laws, whenever he receives an injury." *Bivens*, 403 U.S. at 397 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

B. Bias is the issue.

This Court has consistently analyzed issues of bias or fairness under the Due Process Clause. In examining bias, the Court will look to a state actor that "occupies two practically and seriously inconsistent positions" where one is subject to bias, particularly financial bias, and the other is regulatory. *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972). As a general matter, government employees are presumed to be impartial in the execution of their authority; when a state actor has a "direct, personal, substantial pecuniary interest" in the result, however, he has a motivation to act in his own interest. *Id.* (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)). Thus, when there is a substantial

pecuniary interest at stake, there is a high likelihood that the delegation can be found unconstitutional.

For example, during Prohibition in the 1920s, an Ohio statute stated that judges in cases of violation of the prohibition law would receive a portion of any resulting fines. One Ohio mayor served as a judge, and the only way for the mayor and other official parties involved in the arrest to receive their portion of the fine was if the accused were found guilty. *Tumey*, 273 U.S. at 521–23. Due process was violated because a criminal defendant's liberty and property was subjected to a court where the judge had a "direct, personal, substantial pecuniary interest" in a particular outcome. *Id.* at 523.

In a similar case, a substantial part of the income of the village of Monroeville, Ohio, was derived from fines obtained from violations of certain ordinances and traffic offenses. The Mayor of Monroeville acted as a judge in this case as well, and although the mayor did not benefit financially from the resulting fines, the Court held that the situation still introduced a substantial pecuniary bias that prevented the mayor from acting as an impartial judge. *Ward*, 409 U.S. at 60. The Court in Ward suggested that the test for bias in these cases is whether the situation "is one which would offer a possible temptation to the average man... which might lead him not to hold the balance nice, clear, and true" between the competing interests. *Id.*

In *Aetna Life Ins. Co. v. Lavoie*, an Alabama Supreme Court justice was the deciding vote on a 5-4

decision regarding punitive damages on a bad-faith claim against Blue Cross-Blue Shield of Alabama. The justice was also a party in a pending lawsuit against Blue Cross-Blue Shield of Alabama, and the decision of the Alabama Supreme Court would be binding in that case. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 816–17 (1986). The decision "had the clear and immediate effect of enhancing both the legal status and the settlement value of [the justice's] own case," and this Court found clear bias and a violation of due process. *Id.* at 823–24.

When compared to government employees, the bias of a private party may be found even greater—particularly if delegation to private parties allows those parties unconstrained discretion. The private-public distinction, however, is not significant as long as the party is a state actor for the purpose of due process, and this Court has unequivocally stated that Amtrak is a state actor for this purpose. Thus, the important factors for consideration of Respondent's due process challenge should instead be the existence of bias by the actor and the extent of that bias.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Colombia Circuit should be granted, and the decision below vacated and remanded to be considered under the Due Process Clause of the Fifth Amendment.

Respectfully submitted,

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April 10, 2014

JOINT APPENDIX

No. 13-1080

In the Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

ASSOCIATION OF AMERICAN RAILROADS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: MAR. 10, 2014
CERTIORARI GRANTED: JUNE 23, 2014

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5204

ASSOCIATION OF AMERICAN RAILROADS,
PLAINTIFF-APPELLANT

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION;
ANTHONY FOXX, IN HIS OFFICIAL CAPACITY AS
SECRETARY OF TRANSPORTATION;
FEDERAL RAILROAD ADMINISTRATION;
JOSEPH C. SZABO, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR, FEDERAL RAILROAD ADMINISTRATION,
DEFENDANTS-APPELLEES

DOCKET ENTRIES

DATE	PROCEEDINGS
6/26/12	US CIVIL CASE docketed. [12-5204]
6/26/12	NOTICE OF APPEAL filed [1380763] by Association of American Railroads seeking review of a decision by the U.S. District Court in 1:11-cv-01499-JEB. Assigned USCA Case Number [12-5204]
	* * * * *
10/9/12	*JOINT* APPENDIX [1398777] filed [Volumes: 1] [Service Date: 10/09/2012] [12-5204] (Dupree, Thomas)
10/10/12	*CORRECTED* APPELLANT BRIEF [1398880] filed by Association of American

DATE	PROCEEDINGS
	Railroads [Service Date: 10/10/2012] Length of Brief: 11,285 Words. [12-5204] (Dupree, Thomas)
11/8/12	APPELLEE BRIEF [1404004] filed by FRA, Raymond L. LaHood, Joseph C. Szabo and DOT [Service Date: 11/08/2012] Length of Brief: 7902 words. [12-5204] (Raab, Michael)
	* * * * *
11/30/12	APPELLANT REPLY BRIEF [1407763] filed by Association of American Railroads [Service Date: 11/30/2012] Length of Brief: 6,464. [12-5204] (Dupree, Thomas)
2/6/13	PER CURIAM ORDER filed [1419086] allocating oral argument time as follows: Appellant—15 Minutes, Appellees—15 Minutes. One counsel per side to argue; directing party to file Form 72 notice of arguing attorney—due 02/12/2013 [12-5204]
2/8/13	FORM 72 submitted by arguing attorney, Thomas H. Dupree, Jr., on behalf of Appellant Association of American Railroads. [12-5204] (Dupree, Thomas)
2/8/13	FORM 72 submitted by arguing attorney, Michael S. Raab, on behalf of Appellees FRA, Raymond L. LaHood, Joseph C. Szabo and DOT. [12-5204] (Raab, Michael)
2/19/13	ORAL ARGUMENT HELD before Judges Brown, Williams and Sentelle. [12-5204]

DATE	PROCEEDINGS
7/2/13	PER CURIAM JUDGMENT filed [1444664] that the judgment of the District Court appealed from in this cause is hereby reversed for the reasons in the accompanying opinion. Before Judges: Brown, Williams and Sentelle. [12-5204]
7/2/13	OPINION filed [1444666] (Pages: 21) for the Court by Judge Brown [12-5204]
7/2/13	CLERK'S ORDER filed [1444667] withholding issuance of the mandate. [12-5204]
8/16/13	PETITION filed [1452077] by Appellees FRA, Anthony Foxx, Joseph C. Szabo and DOT for rehearing, for rehearing en banc. [Service Date: 08/16/2013 by CM/ECF NDA] Pages: 11-15. [12-5204] (Raab, Michael)
8/21/13	CLERK'S ORDER filed [1452639] Upon consideration of the petition for rehearing en banc, it is ORDERED, on the court's own motion, that within 15 days of the date of this order, appellant file a response to the petition for rehearing en banc, not to exceed 15 pages. Absent further order of the court, the court will not accept a reply to the response. [1452077-3] [12-5204]
8/27/13	TRANSCRIPT [1453749] of oral argument [12-5204]
9/5/13	RESPONSE FILED [1455112] by Association of American Railroads to petition for rehearing [1452077-2], petition for rehear-

DATE	PROCEEDINGS
	ing en banc [1452077-3] [Service Date: 09/05/2013 by CM/ECF NDA] Pages: 11-15. [12-5204] (Dupree, Thomas)
10/11/13	PER CURIAM ORDER filed [1460815] denying petition for rehearing [1452077-2] Before Judges: Brown, Williams and Sentelle. [12-5204]
10/11/13	PER CURIAM ORDER, En Banc, filed [1460816] denying petition for rehearing en banc [1452077-3] Before Judges: Garland, Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh and Srinivasan. [12-5204]
10/22/13	MANDATE ISSUED to Clerk, District Court [12-5204]

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(Washington, DC)

No.: 1:11-cv-01499-JEB

ASSOCIATION OF AMERICAN RAILROADS, PLAINTIFF

v.

DEPARTMENT OF TRANSPORTATION; RAY LAHOOD IN HIS OFFICIAL CAPACITY AS SECRETARY OF TRANSPORTATION, FEDERAL RAILROAD ADMINISTRATION; JOSEPH C. SZABO, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR, FEDERAL RAILROAD ADMINISTRATION, DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
8/19/11	1	COMPLAINT against DEPARTMENT OF TRANSPORTATION, FEDERAL RAILROAD ADMINISTRATION, RAY LAHOOD, JOSEPH C. SZABO (Filing fee $ 350, receipt number 4616041569) filed by ASSOCIATION OF AMERICAN RAILROADS. (Attachments: # 1 Civil Cover Sheet) (jf,) (Entered: 08/22/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
8/19/11		SUMMONS (6) Issued as to DEPARTMENT OF TRANSPORTATION, FEDERAL RAILROAD ADMINISTRATION, RAY LAHOOD, JOSEPH C. SZABO, U.S. Attorney and U.S. Attorney General (jf,) (Entered: 08/22/2011)
		* * * * *
8/19/11	4	NOTICE of Constitutional Question by ASSOCIATION OF AMERICAN RAILROADS (jf,) (Entered: 08/22/2011)
9/26/11	5	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. All Defendants, RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed on United States Attorney General. Date of Service Upon United States Attorney General 8/23/2011., RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed as to the United States Attorney. Date of Service Upon United States Attorney on 8/22/2011. (Answer due for ALL FEDERAL DEFENDANTS by 10/21/2011.) (Attachments: # 1 Exhibit) (Wilkinson, Porter) (Entered: 09/26/2011)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
12/2/11	8	MOTION for Summary Judgment by ASSOCIATION OF AMERICAN RAILROADS (Attachments: # 1 Text of Proposed Order, # 2 Declaration Dupree, # 3 Exhibit A to Dupree Decl, # 4 Exhibit B to Dupree Decl, # 5 Exhibit C to Dupree Decl, # 6 Exhibit D to Dupree Decl, # 7 Exhibit E to Dupree Decl, # 8 Exhibit F to Dupree Decl, # 9 Exhibit G to Dupree Decl, # 10 Exhibit H to Dupree Decl, # 11 Exhibit I to Dupree Decl, # 12 Exhibit J to Dupree Decl, # 13 Exhibit K to Dupree Decl, # 14 Exhibit L to Dupree Decl, # 15 Exhibit M to Dupree Decl, # 16 Exhibit N to Dupree Decl, # 17 Exhibit O to Dupree Decl, # 18 Exhibit P to Dupree Decl, # 19 Exhibit Q to Dupree Decl, # 20 Declaration Ladue, # 21 Declaration Beck, # 22 Declaration Owens, # 23 Exhibit A to Owens Decl, # 24 Declaration Harris) (Dupree, Thomas) (Entered: 12/02/2011)
		* * * * *
2/3/12	10	MOTION for Summary Judgment by DEPARTMENT OF TRANSPORTATION, FEDERAL RAILROAD ADMINISTRATION, RAY

DATE	DOCKET NUMBER	PROCEEDINGS
		LAHOOD, JOSEPH C. SZABO (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Text of Proposed Order) (Sandberg, Justin) (Entered: 02/03/2012)
2/3/12	11	Memorandum in opposition to re 8 MOTION for Summary Judgment filed by DEPARTMENT OF TRANSPORTATION, FEDERAL RAILROAD ADMINISTRATION, RAY LAHOOD, JOSEPH C. SZABO (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit) (Sandberg, Justin) (Entered: 02/03/2012)
3/6/12	12	Memorandum in opposition to re 10 MOTION for Summary Judgment filed by ASSOCIATION OF AMERICAN RAILROADS. (Attachments: # 1 Declaration Wilkinson, # 2 Exhibit A to Wilkinson Decl.) (Dupree, Thomas) (Entered: 03/06/2012)
3/6/12	13	REPLY to opposition to motion re 8 MOTION for Summary Judgment filed by ASSOCIATION OF AMERICAN RAILROADS. (Attachments: # 1 Declaration Wilkinson, # 2 Exhibit A to Wilkinson Decl) (Dupree, Thomas) (Entered: 03/06/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
4/13/12	15	REPLY to opposition to motion re 10 MOTION for Summary Judgment filed by DEPARTMENT OF TRANSPORTATION, FEDERAL RAILROAD ADMINISTRATION, RAY LAHOOD, JOSEPH C. SZABO. (Sandberg, Justin) (Entered: 04/13/2012)
5/31/12	16	ORDER denying 8 Plaintiff's Motion for Summary Judgment and granting 10 Defendants' Motion for Summary Judgment. Judgment is ENTERED in favor of Defendants. Signed by Judge James E. Boasberg on 5/31/2012. (lcjeb2) (Entered: 05/31/2012)
5/31/12	17	MEMORANDUM OPINION to 16 Order. Signed by Judge James E. Boasberg on 5/31/2012. (lcjeb2) (Entered: 05/31/2012)
6/22/12	18	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 17 Memorandum & Opinion, 16 Order on Motion for Summary Judgment, by ASSOCIATION OF AMERICAN RAILROADS. Filing fee $ 455, receipt number 0090-2979605. Fee Status: Fee Paid. Parties have been

DATE	DOCKET NUMBER	PROCEEDINGS
		notified. (Dupree, Thomas) (Entered: 06/22/2012)
		* * * * *
10/23/13	20	MANDATE of USCA (certified copy) as to 18 Notice of Appeal to DC Circuit Court, filed by ASSOCIATION OF AMERICAN RAILROADS; ORDERED and ADJUDGED that the judgment of the District Court appealed from in this cause is hereby reversed, in accordance with the opinion of the court filed herein this date. USCA Case Number 12-5204. # 1 USCA Opinion) (md,). (Entered: 10/23/2013)

[Mar. 13, 2009]

Provisional Staff Exposure Draft:
PROPOSED METRICS AND STANDARDS FOR INTERCITY PASSENGER RAIL SERVICE

Executive Summary

In accordance with Section 207 of the Passenger Rail Investment and Improvement Act of 2008, the Federal Railroad Administration (FRA) and Amtrak are jointly submitting for stakeholder comment the following proposed metrics and standards for intercity passenger rail service. Further explanation appears in the Main Report. The FRA emphasizes that, in the current absence of confirmed appointees to many policy-making and leadership positions in the U.S. Department of Transportation, this Executive Summary and Main Report must be regarded as a provisional staff exposure draft, subject to review and revision by the appointed policy-makers.

Metric/ Standard Category	Metric/Standard Subcategory	Reported by—	Statutory Require-ment	Added Measure	Proposed Standard; Comments
Financial/ Operating	Percent of Short-Term Avoidable Operating Cost Covered by Passenger-Related Revenue (exclude capital charges)	route	✓		Continuous year-over-year improvement
	Percent of Fully Allocated Operating Cost Covered by Passenger-Related Revenue (exclude capital charges)	route	✓		
	Long-term avoidable operating loss per PM (exclude capital charges)	route		✓	
	Passenger-Miles per Train-Mile	route	✓		
	Adjusted (Loss)[1] per passenger-mile	system		✓	

[1] The definition of Adjusted (Loss) is: Net Operating Loss (before net interest expense), less Depreciation, Other Post-Employment Benefits (OPEB's) and project costs covered by capital funding.

Metric/ Standard Category	Metric/Standard Subcategory	Reported by—	Statutory Require-ment	Added Measure	Proposed Standard; Comments
On-Time Performance and Train Delays	**On-Time Performance (OTP).** This congressionally-mandated metric/standard will consist of two tests in FY 2009, and three tests beginning in FY 2010. **All tests applicable in a given year must be met for the route to be considered as meeting the OTP standard.**	route	✓		
	Test No. 1: Change in "Effective Speed"[2]				Effective speed must be equal to or better than the original baseline, based on the Fall/ Winter 2007-08

[2] "Effective Speed" is defined as a route's mileage, divided by the sum of (a) the scheduled end-to-end running time plus (b) the average endpoint terminal lateness. In other words, effective speed is the distance divided by the average time it actually takes for trains on the route to get from one endpoint to the other. Endpoint terminal lateness is reported on a zero tolerance basis—i.e., without any minutes of tolerance.

Metric/ Standard Category	Metric/Standard Subcategory	Reported by—	Statutory Require-ment	Added Measure	Proposed Standard; Comments
					System Timetable plus actual end-point terminal late-ness during FY 2007.
	Test No. 2: Endpoint OTP				In FY 2009, End-point OTP[3] must be at least 80% for all routes except Acela (90%) and other Northeast

[3] A train is considered "late" if it arrives at its endpoint terminal more than 10 minutes after its scheduled arrival time for trips up to 250 miles; 15 minutes for trips 251-350 miles; 20 minutes for trips 351-450 miles; 25 minutes for trips 451-550 miles; and 30 minutes for trips of 551 or more miles. These tolerances are based on former ICC rules. An exception is that all Acela trips, regardless of run length, are considered late if they arrive at their endpoint terminal more than 10 minutes after their scheduled arrival time. A 15-minute tolerance is used for all-stations OTP, which is based on 49 U.S.C. Section 24101(c)(4) (Acela will continue to have a 10 minute tolerance for all-stations OTP).

Metric/ Standard Category	Metric/Standard Subcategory	Reported by—	Statutory Require-ment	Added Measure	Proposed Standard; Comments
					Corridor (NEC) corridor routes (85%). By FY 2013, Endpoint OTP must be at least 95% for Acela, 90% for all other corridor routes (including non-Acela corridor routes on the NEC), and 85% for long-distance routes.
	Test No. 3: All-Stations OTP (Effective as of FY 2010)				Effective FY 2010, All-Stations OTP must be at least 80% for all routes except Acela (90%) and other NEC corridor

Metric/ Standard Category	Metric/Standard Subcategory	Reported by—	Statutory Require-ment	Added Measure	Proposed Standard; Comments
					routes (85%). By FY 2013, All-Stations OTP must be at least 95% for Acela, 90% for all other corridor routes (including non-Acela corridor routes on the NEC), and 85% for long-distance routes. This metric will be published immediately even though the test is not in effect until FY 2010.

Metric/ Standard Category	Metric/Standard Subcategory	Reported by—	Statutory Requirement	Added Measure	Proposed Standard; Comments
	Train Delays—Off Northeast Corridor (NEC). This Congressionally-mandated metric/standard will consist of two tests:				Delays in all years must be less than the standards shown below, which were developed by regression.
	Amtrak-Responsible Delays per 10,000 Train-Miles	**route and host**	✓		250 minutes per 10,000 Train Miles.
	Host-Responsible Delays per 10,000 Train-Miles	**route and host**			700 minutes per 10,000 Train Miles. Direct causes of delay will also be shown for information (with no standard attached to them).

Metric/ Standard Category	Metric/Standard Subcategory	Reported by—	Statutory Requirement	Added Measure	Proposed Standard; Comments
	Train Delays—On NEC Only. This congressionally-mandated metric/standard will consist of four tests:	route and host	✓		Delays in all years must be less than the standards shown below, which were developed by regression:
	Infrastructure delays				104 min. Acela; 123 min. other
	Passenger and Commuter Train Interference				67 min. Acela; 116 min. other
	3rd Party Delays (e.g., police actions)				37 min. Acela; 44 min. other
	All other delays				76 min. Acela; 187 min. other

Metric/ Standard Category	Metric/Standard Subcategory	Reported by—	Statutory Requirement	Added Measure	Proposed Standard; Comments
Other Service Quality	Equipment-caused service interruptions per 10,000 train-miles	route	✓		This is an initial metric, intended to reflect objectively the quality of mechanical maintenance as perceived by the passenger. No standard is proposed. The metric would be reported on a route-by-route basis—not for the system as a whole.
	Percent of Passengers "Very Satisfied"[4] with Overall Service	route	✓		82 percent in 2009; 90 percent by 2013

[4] "Very Satisfied" with the service quality is defined as a score in the top three steps on a scale of eleven evaluation ratings that respondents can ascribe to each facet of the service. For a given service factor, "80 percent" means that 80 percent of respondents rated Amtrak in the top three of the eleven steps of the scale

Metric/ Standard Category	Metric/Standard Subcategory	Reported by—	Statutory Require-ment	Added Measure	Proposed Standard; Comments
	Percent of Passengers "Very Satis-fied" with Amtrak personnel	route	✓		For each of these line-items: 80 percent in 2009; 90 percent by 2013
	Percent of Passengers "Very Satis-fied" with Information Given	route	✓		
	Percent of Passengers "Very Satis-fied" with On-Board Comfort	route	✓		
	Percent of Passengers "Very Satis-fied" with On-Board Cleanliness	route	✓		
	Percent of Passengers "Very Satis-fied" with On-Board Food Service	route	✓		
	Future: Percent of Passengers "Very Satisfied" with the overall station experience	route	✓		Future; standard to be determined
	Future: Percent of Passengers "Very Satisfied" with the overall sleeping car experience	route	✓		Future; standard to be determined

Metric/ Standard Category	Metric/Standard Subcategory	Reported by—	Statutory Requirement	Added Measure	Proposed Standard; Comments
	Presentation of Amtrak passenger comment data by subject matter and major route grouping (NEC, other corridors, long-distance); see discussion	type of route		✓	No standard proposed; presented as supplementary information
Service Availability/ Connectivity	Connectivity measure(s): Percent of passengers connecting to/from other routes. To be updated annually.	long-distance route	✓		No standard possible; improvement could require network changes
	Availability of other modes: Percent of passenger-trips to/from underserved communities.[5] To be updated annually.	route, system	✓		No standard possible; improvement could require network changes

[5] "Underserved communities" would be defined for this purpose as those more than 25 miles from a place with 50,000 or more inhabitants. This definition is subject to change as research progresses.

Provisional Staff Exposure Draft:

MAIN REPORT: METRICS AND STANDARDS FOR INTERCITY PASSENGER RAIL SERVICE

Section 207 of Division B of Public Law 110-432 (the Passenger Rail Investment and Improvement Act of 2008—"the Act") states as follows:

> (a) In General.—Within 180 days after the date of enactment of this Act, the Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services. Such metrics, at a minimum, shall include the percentage of avoidable and fully allocated operating costs covered by passenger revenues on each route, ridership per train mile operated, measures of on-time performance and delays incurred by intercity passenger trains on the rail lines of each rail carrier and, for long-distance routes, measures of connectivity with other routes in all regions currently receiving Amtrak service and the transportation needs of communities and populations that are not well-served by other forms of intercity transportation. Amtrak shall provide reasonable access to the Federal Railroad Administration in or-

der to enable the Administration to carry out its duty under this section.

(b) Quarterly Reports.—The Administrator of the Federal Railroad Administration shall collect the necessary data and publish a quarterly report on the performance and service quality of intercity passenger train operations, including Amtrak's cost recovery, ridership, on-time performance and minutes of delay, causes of delay, on-board services, stations, facilities, equipment, and other services.

(c) Contracts With Host Rail Carriers.—To the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards developed under subsection (a) into their access and service agreements.

(d) Arbitration.—If the development of the metrics and standards is not completed within the 180-day period required by subsection (a), any party involved in the development of those standards may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration.

The purpose of this Exposure Draft is to solicit comment, from the stakeholders identified in the Act, on a conceptual framework and proposed set of metrics and standards responding to Section 207.

Conceptual Framework

The metrics described in Section 207 of the Act fall into four basic categories, as follows:

- **Financial and operating.** These metrics would address cost recovery—the degree to which each

route covers its operating costs from ticket and on-board food revenue. A related measure, ridership per train-mile operated, would capture the intensity of use generated by each Amtrak route. These measures would address the **efficiency**—in purely commercial terms—of Amtrak's operations and finances.

- **On-time performance (OTP).** The March 28, 2008 report by the Inspector General of the U.S. Department of Transportation, "Effects of Amtrak's Poor On-Time Performance," found that poor on-time performance costs Amtrak over $100 million per year in lost revenues and increased costs.[6] In appropriation language for Fiscal Years 2008 and 2009, the Congress has emphasized the criticality of on-time performance—particularly the reliability of Amtrak trains on host railroads. Accordingly, the Act's language requires that on-time performance and minutes and causes of delay be reported by host carrier and by route, and that standards be set. This category is all the more important because deficiencies in performance could subject host railroads to fines administered by the Surface Transportation Board (STB), which the Act now endows with limited regulatory authority over passenger train service quality.

- **Other service quality.** In referring to "on-board services, stations, facilities, equipment, and other services," the Act is clearly attempting to characterize the quality of the typical passenger's expe-

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[6] The report is available at http://www.oig.dot.gov/StreamFile?file=/data/pdfdocs/effects_of_otp_report_FINAL.pdf.

rience of the intercity rail system. In so doing, the Act is addressing the **effectiveness** of Amtrak in responding to its broader mandate: to serve the public convenience and necessity by providing comfortable and convenient—and certainly, safe and healthful—service. These "other" (i.e., other than OTP-related) service quality factors are of critical importance because any major flaw in their execution—for example, rank discourtesy on the part of an Amtrak employee, plumbing failures in the retention sewage system now mandatory on Amtrak cars, a lack of working heat or air conditioning in a coach, sleeping car, or station, or a shortage of food on excessively-delayed runs—can ruin a passenger's trip and deprive Amtrak of repeat and word-of-mouth business and much-needed revenue. Indeed, every phase of the "passenger experience"—the summation of the traveler's encounter with the line-haul intercity mode and other modes of access and egress as he or she moves from true origin to true destination in a trip—could theoretically enter into the evaluation of Amtrak's performance, as a major flaw may occur at any point. (See Table 1.) Smooth connectivity among intercity and access/egress modes, including reciprocal through-ticketing and information arrangements, would clearly be a desirable element of intercity passenger transportation in the 21st Century. However, Amtrak's current responsibility extends only to a subset of the passenger experience, the number of manageable metrics is limited, and direct quantification of experiential factors may present stiff challenges, as will be discussed below. Thus, the "other" modes

listed in the table cannot enter at this time into the metrics and standards under the Act.

Table 1: Phases of the Passenger Experience[7]

Phase	Activity Location and Responsibility ("A" = Amtrak; "o" = others)			
	At home or office	On access/ egress mode(s)	At station	On train
Information—passenger inquires about intercity services and access/egress to and from them; obtains real-time travel information	A, o	o	A, o	A
Reservations/ ticketing/ticket verification—passenger plans trip, buys transportation, and has transportation checked	A	o	A, o	A
Access—passenger reaches originating station, waits for train, boards		o	A	

[7] Adapted from Neil E. Moyer and Richard M. Michaels, *User-Determined Priorities for Service Quality Control in a Railroad Passenger System*, Research Report of the Transportation Center at northwestern University, 1972.

Phase	Activity Location and Responsibility ("A" = Amtrak; "o" = others)			
	At home or office	On access/ egress mode(s)	At station	On train
Accommodation—passenger's creature comforts, necessities, and effects are provided for		o		
Movement–passenger undergoes movement		o		
Egress—passenger deboards train, traverses station, reaches destination		o		

- **Service Availability/Connectivity.** In the Act, the Congress expressed particular concern for the connectivity of long-distance routes with all regions currently receiving Amtrak service, and with the provision of transportation to areas that lack good service from other intercity travel modes. The degree to which Amtrak provides such connectivity and overcomes gaps in other modes' service depends largely on the size and train frequency of the Amtrak network. Expansions of long-distance service—either in route-mileage or in frequency—might well require additional funding from public sources. Thus, while small service adjustments may be possible on a site-specific basis, the availability and connectivity of long-distance services are largely

outside Amtrak's short-term control. Even so, it is possible to provide some measures that would indicate to the Congress the degree to which connections are possible among routes, and the availability of service to locations that typically lack good access to other modes.

Application of the Metrics and Standards

As conceived in the Act, the metrics and standards have practical implications, as described in Table 2.

Table 2: Implications of the Section 207 Metrics and Standards

Topic	Use of Metrics/Standards	Enforcement Mechanism
Amtrak/ Host Railroad Agreements (§207(c))	"To the extent practicable, Amtrak and its host rail carriers shall incorporate the [§207] metrics and standards into their access and service agreements."	
Long-Distance Routes (§210)	Amtrak is to evaluate annually the financial and operating performance of each long-distance route, to triage the routes into three equal groups based on their relative performance [under the §207 Metrics], and to develop comprehensive performance improvement plans (PIPs) over a three-year period.	FRA has enforcement responsibility under §210. If Amtrak falls short of its PIP objectives, FRA shall notify Amtrak, the DOT Inspector General, and the Authorizing Committees of the Congress; shall give Amtrak an opportunity for a hearing; and—if the route in question is

Topic	Use of Metrics/Standards	Enforcement Mechanism
		among the worst-performing third—FRA may withhold appropriated funding for that route (except for safety/security funds).
Passenger Train Performance [in general] (§213)	The STB ***may*** initiate an investigation if the on-time performance of any intercity passenger train averages less than 80% for any 2 consecutive calendar quarters, ***or*** if the service quality of intercity passenger train operations for which minimum standards are established under section 207 fails to meet those standards for 2 consecutive calendar quarters. In addition, the STB ***must*** initiate an investigation upon the filing of a complaint by Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service.	The STB has the power to "identify reasonable measures and make recommendations to improve" the on-time performance of the train. If the delays, or failures to achieve minimum standards, are found to be attributable to a rail carrier's failure to provide preference to Amtrak as required by 49 U.S.C. section 24308(c), the Board may award damages against the host rail carrier as well as "such other relief to Amtrak" as the STB determines to be reasonable and appropriate.

Topic	Use of Metrics/Standards	Enforcement Mechanism
Alternate Passenger Rail Service Pilot Program (§214)	The §207 metrics would come into play in this program as follows: • FRA is to evaluate bids against the §207 metrics; • Preference is to be given to projects involving one of the five worst-performing long-distance routes under §210, as ranked on the §207 metrics; • Operating and subsidy rights of any winning bidder are conditioned on its compliance with the §207 metrics.	
On-Board Service Improvements (§222)	Within one year from establishment of the §207 metrics, Amtrak shall develop and implement a plan to improve on-board services in accordance with the §207 metrics for such services, and shall report to the Congressional authorizing committees on that plan.	
Capital Assistance for Intercity Passenger Rail Service (§301)	The project's estimated performance against the minimum standards of §207 is a selection factor for project proposals under the State grant program. (49 CFR §24402(c)(2)(A)). " . . . the project's levels of estimated	

Topic	Use of Metrics/Standards	Enforcement Mechanism
	ridership, increased on-time performance, reduced trip time, additional service frequency to meet anticipated or existing demand, or other significant service enhancements as measured against minimum standards developed under section 207 of the Passenger Rail Investment and Improvement Act of 2008"	
Congestion Grants (§302)	Under 49 CFR §24105(b), "Projects eligible for grants under this section include projects—. . . (2) Identified by the Surface Transportation Board as necessary to improve the on time performance and reliability of intercity rail passenger transportation under section 24308(f);" Section 24308(f) is the STB process which relies on Section 207 metrics and standards.	
High-Speed Rail (HSR) Corridor Program (§501)	The project's estimated performance against the minimum standards of §207 is a selection factor for project proposals under the HSR grant program. (49 CFR §26106(e)(2)(B)(i)(I))—similar wording as in §301.	

Principles for Selecting Metrics and Setting Standards

The Federal Railroad Administration (FRA) and Amtrak, jointly charged with developing the metrics and standards in consultation with the Surface Transportation Board (STB) and the other stakeholders named in Section 207 of the Act, have applied the following principles in going about their task:

- Metrics and standards should respond directly and transparently to the specific purposes laid out for them by the Congress. Section 213, for example, sets two quarters of OTP or other service quality standards established by Section 207 as benchmarks for future evaluations and potential STB action; therefore, the metrics should readily provide two quarters of OTP and service quality results.
- Metrics and standards must respond, at the very least, to the explicit Congressional requirement:
  - In Section 207(a): the percentage of avoidable and fully allocated operating costs covered by passenger revenues on each route, ridership per train mile operated, measures of on-time performance and delays incurred by intercity passenger trains on the rail lines of each rail carrier and, for long-distance routes, measures of connectivity with other routes in all regions currently receiving Amtrak service and the transportation needs of communities and populations that are not well-served by other forms of intercity transportation.
  - In Section 207(b): the performance and service quality of intercity passenger train opera-

tions, including Amtrak's cost recovery, ridership, on-time performance and minutes of delay, causes of delay, on-board services, stations, facilities, equipment, and other services.

- At least at the outset, metrics should be readily obtainable from existing Amtrak data, or through speedy consultation of Amtrak's data warehouse. Major programming efforts and research studies, with their attendant costs in terms of dollars and staff time, should be avoided.
- For the same reason, the establishment and prescribed use of metrics cannot entail the creation and deployment of new staffing and organizational structures, nor can it imply a return to a regulatory regime akin to that of the 1970s.
- Because underlying conditions may change with time, the metric- and standard-setting process will require periodic review and renewal. Changing information systems may, for example, make it possible to obtain previously unavailable categories of data. Similarly, Amtrak and host railroad performance on a given metric may improve to such a degree that new, higher standards must be supplied to provide motivating goals.
- In general, where this draft proposes higher standards for 2013 than for 2009, the FRA and Amtrak envision that approximately one-third of the resulting increment will be added to the 2009 standard in each of the years 2011, 2012, and 2013. As a known special case with a higher beginning standard in FY09, and due to ongoing investments in the Northeast Corridor (NEC), Acela OTP would

not be required to improve over its 90 percent standard until 2013, when the standard would rise to 95 percent.

Reporting Periods

Where data exist, the FRA and Amtrak propose to report on Amtrak's performance under the metrics for the following periods:

- Most recent quarter
- For certain OTP and service quality data: The prior quarter (to satisfy the need for data for "two consecutive quarters" under §213);
- Average of the most recent four quarters (i.e., rolling annual results)
- Each of the periods above versus the same period in the previous year

Schedule for Setting and Reporting On Metrics and Standards

The Congress established a deadline for adoption of final standards 180 days after enactment of the Act, or April 13, 2009. Amtrak and the FRA are working diligently toward that deadline. The FRA adds the proviso that any metrics and standards issued with FRA staff participation prior to the installation of the new Federal Railroad Administrator and other policy-makers reporting to the Secretary of Transportation must be regarded as provisional.

Once the metrics and standards are in place, the first report under Section 207(b) of the Act is intended to be issued at the beginning of the following calendar quarter. Thus (subject to the above proviso from FRA), publica-

tion of the standards on April 13, 2009 would be followed by a report on July 1, 2009, covering data for the quarters ending December 31, 2008 and March 31, 2009. Certain data elements—for example, financial performance utilizing Amtrak's new cost accounting system, which is actively in process of implementation—may need to be phased into the quarterly reports as necessary data become available.

Proposed Metrics and Standards

This section discusses each of the topical areas in greater detail, and proposes metrics and standards to be applied to each metric.

Financial/Operating Measures

Measures by route. The Act specifies "the percentage of avoidable and fully allocated operating costs covered by passenger revenues on each route." In strict compliance with this mandate, the FRA and Amtrak are proposing the following measures:

- **Route Revenues divided by Short-Term Avoidable Operating Expenses.**

  "Route Revenues" is the sum of the following items:

  - Total Passenger Revenue including Food & Beverage;
  - Total Mail & Express Revenue (includes package express and baggage revenue); and
  - Total State Revenue (State operating subsidies).

  All the above revenue elements are most appropriate for inclusion in this ratio, as they are

earned through the incurrence of the operating expenses described below. For purposes of these metrics, State operating subsidies are appropriate elements of "Route Revenues" as the States are purchasing services with them: in a sense, they are a supplement to the passengers' ticket payments.[8] Thus, revenues and expenses are well matched.

"Short-Term Avoidable Operating Expenses" are the operating costs that would cease within one year of a route's cancellation. As the Congress uses the term "operating" costs, capital charges are proposed to be excluded from the calculation of this measure, although such capital costs may appropriately enter into analyses for many other important purposes.

The source for this and the next measure is intended to be the new "Amtrak Performance Tracking" (APT) system, which will provide short- and long-term avoidable, and fully allocated, costs by route. Because this data source will not be comparable with its predecessor, the "Route Profitability System" (RPS), year-over-year comparisons on these measures will only begin to be available with the fifth quarterly report that includes APT data.

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[8] From a purely economic standpoint, the operating efficiency of a particular route may arguably best be measured without the inclusion of state subsidies in revenues. This is particularly true as the State subsidies are calculated, over time, on the basis of actual (as opposed to State-subsidized) operating deficits, i.e., "revenues excluding State subsidies" minus expenses, among other factors.

- **Route Revenues divided by Fully-Allocated Operating Expenses.** This would be similar to the prior measure, except that the denominator would be the fully-allocated operating expenses. These are the operating costs that include, for each route, a fully-loaded share of overhead-type costs (for example, information technology at the corporate level) that pertain to more than one route or to the company as a whole.

- **Long-Term Avoidable (Loss) per Passenger-Mile.** Over and above the cost recovery ratios mandated in the Act, a key measure of each route's cost-effectiveness is its near-cash loss per unit of output, i.e., per passenger-mile generated. The loss per passenger-mile most directly identifies what each basic unit of route output (i.e., each passenger-mile of transportation that is generated), costs the public to produce. Use of this measure will facilitate comparisons of the cost-effectiveness of various routes and types of routes.

In addition to these financial measures, the FRA and Amtrak are proposing to include the metric "passenger-miles per train-mile" in response to the Congressional requirement to address "ridership per train-mile operated." The proposed metric reveals the average number of passengers on each of the route's trains.

Standards by route. Amtrak and the FRA are proposing a standard of "continuous improvement" for the three financial metrics: We will expect these metrics to improve each year from FY 2009 (the first year in which APT data will be available) through FY 2013. Because the APT will completely renovate the manner

in which fully-allocated costs are calculated, and because Amtrak's accounting systems prior to APT have not generated avoidable costs, there is no historical basis for quantifying the improvement that can be expected each year on these measures.

The change in long-term avoidable (loss) per passenger-mile is intended to be measured on a constant-dollar basis.

For passenger-miles per train-mile (PM/TM), neither a single nationwide standard nor a PM/TM standard for each major category of routes (e.g., non-NEC corridors, or long-distance routes) would be appropriate, due to route-by-route variances in equipment consists, density of population centers served, and funding sources.[9] Therefore, a "continuous improvement" standard on a route-by-route basis is proposed for PM/TM.

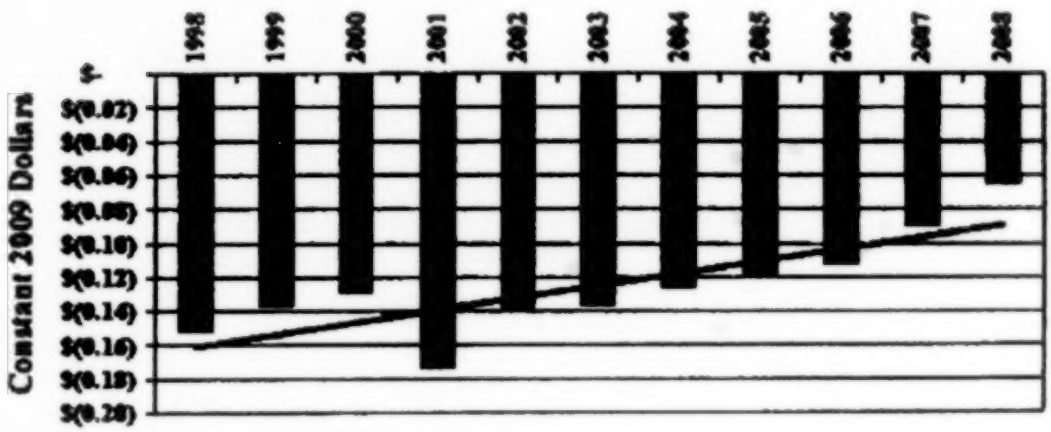
Corporate Measure: Adjusted (Loss) per Passenger-Mile. The numerator of the proposed measure ("Adjusted (Loss)") represents the summary result of the Company's operations, the fundamental purpose of which (according to the Rail Passenger Service Act of 1970) is to provide intercity passenger rail transportation, of which the denominator (passenger-miles) is the best measure. The lower the net cost per passenger-mile (i.e., the lower the "Adjusted (Loss)" per passenger-mile), the more efficiently Amtrak is fulfilling its raison d'être.

While Amtrak conducts other businesses than passenger transportation, such as real estate development, those other businesses exist fundamentally to defray the

[9] States are free to negotiate with Amtrak for as many train frequencies as they are willing to support, regardless of density of use.

net cost of the core intercity passenger business by making the highest and best use of assets and capabilities that Amtrak has acquired in the course of its core activities. In other words, the other businesses are by-products. They would not exist, and Congress would likely never have created Amtrak, if their existence were an end in itself. The "Adjusted (Loss)," balancing the income from by-product businesses against the losses of the core passenger business, represents the net outcome of all the corporate activities that either fulfill or cross-subsidize the main purpose of the Corporation. Accordingly, the "Adjusted (Loss) per Passenger-Mile" is proposed as the best single measure of Amtrak's efficiency in accomplishing its basic purpose. This measure would best be presented on a constant-dollar basis, as shown in Figure 1:

Figure 1: Adjusted (Loss) per Passenger-Mile, 2002-2008



On-Time Performance Measures

Amtrak has been keeping track of, and reporting on, the on-time performance of its trains since its inception in 1971. In recent years, it has been making public very detailed OTP data in its Monthly Performance Reports (available at: http://www.amtrak.com/servlet/Content

Server/pagename=Amtrak/am2Copy/Title_Image_Copy_Page&c=am2Copy&cid=1081442674477&ssid=322. OTP reports are in section E.). As required by the FY 2008 Appropriations Act, the FRA has been setting standards for, and reporting on, Amtrak on-time performance for over a year. In the course of this OTP work, the FRA has described the various means of measuring OTP, and methods for standard-setting in the OTP arena. These materials are available on the following Web Site: http://www.fra.dot.gov/us/content/1996.

Based on the extensive prior work of both organizations, and in keeping with the provisions of the Act, the FRA and Amtrak are proposing the following metrics and standards for OTP and delays:

On-Time Performance

Amtrak and FRA propose to apply three separate but related metrics to assess whether a route's OTP is satisfactory. These metrics are as follows:

(1) **Effective Speed.** As elaborated in the FRA's OTP reports to Congress, a route's effective speed is its mileage divided by the sum of (a) its scheduled end-to-end running time and (b) the average lateness of its arrivals at its endpoint terminals. ***Example***: A route between Cities A and B is 1,000 miles long, Its scheduled trip time is 19 hours. On average, its trains arrive at their endpoint terminals one hour late. The effective speed is 1,000 divided by (19 + 1 = 20), or 50 mph,

(2) **Endpoint OTP.** This is the simple percentage of a route's trains that arrive at their endpoint terminals

within a specified tolerance. The tolerance used varies by route length and is based on former ICC rules.[10]

(3) **All-Stations OTP.** This is the percentage of train times at all of a route's stations that take place within 15 minutes[11] of the time advertised in the timetable. (Acela has a tolerance of 10 minutes.) ***Example:*** A route has, in addition to its endpoints, three intermediate stations for a total of 5 train times per run. There is one round trip daily on the route. Thus, there are ten train times in total daily over the route, for a grand total of 3,650 train times per year. If 3,000 of those train times are within the mandated 15-minute grace period, the train has all-stations OTP of 3,000 divided by 3,650, or 82 percent.

These metrics work in combination to safeguard and advance the OTP of intercity passenger trains. The "endpoint OTP" is the traditional measure that Amtrak has been publishing since its inception. The "effective speed" metric is essential to protect the public, and serve its convenience and necessity, by preventing long-term "schedule creep," in which the running times of a number of routes have lengthened appreciably since 1971, even as OTP has declined. Under the proposed standard, a route's OTP cannot be considered satisfactory if its effec-

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[10] A train is considered "late" if it arrives at its endpoint terminal more than 10 minutes after its scheduled arrival time for trips up to 250 miles; 15 minutes for trips 251-350 miles; 20 minutes for trips 351-450 miles; 25 minutes for trips 451-550 miles; and 30 minutes for trips of 551 or more miles. These tolerances are based on former ICC rules. An exception is that all Acela trips, regardless of run length, are considered late if they arrive at their endpoint terminal more than 10 minutes after their scheduled arrival time.

[11] The 15-minute tolerance for all-stations OTP is based on 49 U.S.C. Section 24101(c)(4).

tive speed has worsened. However, such a standard preserves a modicum of flexibility for Amtrak and the freight railroads to mutually agree to review their passenger train schedules as long as the effective speed stays constant or improves. Finally, the all-stations OTP metric for the first time recognizes that most Amtrak passengers are traveling between, to, or from intermediate stations on the typical route. Moreover, Section 207 of the Act lays great emphasis on the quality of service to less-well-served communities, which are precisely those that are not at the endpoints of their routes. To capture the timekeeping perceived by the average passenger, therefore, it is essential to measure how well Amtrak and its hosts are succeeding in meeting the Congressional mandate to serve "all station stops within 15 minutes of the time established in public timetables." [emphasis added]

Accordingly, the following standards are proposed:

> ***Standard for route-by-route OTP.*** *To meet the standard, a route must meet the first two of the following standards during FY2009, and all three of the following standards for Fiscal Years beginning in 2010:*
>
> *(1) Maintain an effective speed equal to or faster than that in effect at the time the FY 2008 Appropriation Act was enacted*[12]*;*
>
> *(2) Meet an endpoint percent-on-time standard that varies by route type. Endpoint OTP must be at least 80 percent in FY 2009 for all routes except Acela (90 percent) and other NEC corridor routes (85 percent). By FY 2013, Endpoint OTP must be at least 95 percent for Acela, 90 percent for all corridor routes including non-Acela corridor routes on the NEC, and 85 percent for long-distance routes.*
>
> *(3) Beginning in FY 2010, meet an All-Stations OTP standard. All-Stations OTP must be at least 80 percent in FY 2010 for all routes except Acela (90 percent) and other NEC corridor routes (85 percent). By FY 2013, All-Stations OTP must be at least 95 percent for Acela, 90 percent for all corridor routes (including non-Acela NEC corridor routes), and 85 percent for long-distance routes.*

All-Stations OTP metrics will be published in the first quarterly report on metrics and standards. Implementation of the All-Stations OTP *standard* in FY 2010 will allow Amtrak and hosts to examine a potential need to reallocate recovery time in schedules.

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[12] The benchmark effective speed is based on the Fall/Winter 2007-2008 timetable for scheduled running times, plus the average minutes of endpoint terminal lateness that each route experienced in FY 2007.

Minutes of Delay

The FRA, as mandated by section 207 of the PRIIA, plans to report delays to Amtrak trains incurred over each 10,000 train-miles of operation for each route. This statistic normalizes minutes of delay data between routes and is derived from conductor reports that detail all deviations from a route's "pure run-time"[13] outside the NEC. The deviations from "pure run-time" (i.e. delays) can pinpoint the direct delays experienced by Amtrak trains and parties responsible for declining OTP (e.g., slow orders, freight train interference, and mechanical problems), thereby offering a path toward remedial measures. Use of "pure run-time," in calculating delays, is advantageous for many reasons:

- It is a stable number, which allows train delays to be consistently measured over time;
- It is a normalized, comparable measure across all off-NEC routes and hosts
- It provides a basis for remedial action, as it tracks train number, date, and delay location, duration, type, and responsibility (Host, Amtrak, 3rd Party);
- It is not subject to bias by "padding" schedules (since delays are measured against Pure Run Time);
- It records all direct causes of delays to the Amtrak train, not just selected delays;

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[13] The "pure run-time" is the fastest possible trip time for an Amtrak train over a route, with no interference or delays. The established "pure run-time", plus "recovery time" and "station dwell time," yields the published schedule for a route.

- It tracks to a searchable, sortable database with almost a decade of history, that is or can be made accessible to Amtrak, hosts and FRA through Amtrak intranet VPN ;
- It involves established, standardized rules that are applied nationwide; and
- Host railroads and Amtrak have the opportunity to identify and correct any errors for five days after the train origin date.

Amtrak calculates minutes of delay along the NEC using the published run-time ("pure run-time" plus "recovery time") of routes. Amtrak operations along the NEC tend to be stringent in execution, and therefore incorporate less "recovery time" than other routes. This existing variation in the means of calculating delay minutes within and outside the NEC can be normalized through a mathematical adjustment. Specifically, to account for the use of "published run-time" instead of "pure run-time" when calculating delays along the NEC, Amtrak and FRA have proposed tighter delay targets for NEC intercity operations.

In accordance with the legislative mandate, the FRA intends to report "delay minutes per 10,000 train-miles" for each route by both host railroad (e.g. freight railroads, commuter railroads, State agencies, and Amtrak on certain routes) and by direct cause of delay (i.e. freight train interference, slow orders, locomotive failure, etc.). To compliment the percent on time data in the report, "delay minutes per 10,000 train-miles" will be reported on both a rolling four-quarter average basis and for the most recent two quarters. In view of the above-mentioned differences in how Amtrak calculates minutes

of delay, "delay minutes per 10,000 train-miles" will be reported on and off the NEC separately. Table 3 provides an example of host railroad and Amtrak delay data off the corridor while Table 4 provides an example for routes on the NEC. The tables account for the different host-responsible delays that affect Amtrak trains on and off the Corridor; trains such as the *Cardinal*, *Carolinian*, and *Crescent* are included in both tables to account separately for their operations both on and off the Corridor.

Table 3: **Amtrak Delay Minutes per 10,000 Train-Miles for Routes OFF the NEC (Sample Data)**

			Host-Responsible Delays				Amtrak-Resp. Delays
Route	Host	Route Miles	Total	Slow Orders	Freight Train Interference	Other Host Resp	Total
Minimum Standard - Delays Below			700				250
Xxx	XXX	XX	3,019	1,136	596	1,287	229
	XXX	XX	2,498	1,114	179	1,205	222
	XXX	XX	1,354	217	15	1,123	388
	XXX	XX	776	166	0	612	124
Xxx	XXX	XX	1,050	334	218	498	212
Xxx	XXX	XX	647	82	25	561	883
	XXX	XX	2,376	276	1,343	758	689
	XXX	XX	2,935	243	929	1,763	235
Xxx	XXX	XX	1,092	264	364	464	348
	XXX	XX	1,278	386	218	675	188
Xxx	XXX	XX	735	111	51	564	232
Xxx	XXX	XX	1,406	531	361	514	886
	XXX	XX	958	111	387	461	214
Xxx	XXX	XX	2,400	953	691	715	698
	XXX	XX	1,735	617	593	525	449
	XXX	XX	628	159	114	355	151
Xxx	XXX	XX	1,349	226	301	822	306
	XXX	XX	428	141	51	236	783
Xxx	XXX	XX	1,223	180	254	789	448
	XXX	XX	1,537	997	227	313	241
Xxx	XXX	XX	1,547	94	870	582	224
Xxx	XXX	XX	881	142	303	435	288
Xxx	XXX	XX	1,423	146	795	482	67
Xxx	XXX	XX	815	75	197	542	742
	XXX	XX	1,799	62	50	1,687	974
	XXX	XX	1,526	618	182	726	386
Xxx	XXX	XX	581	155	153	273	162

Table 4: Amtrak Delay Minutes per 10,000 Train-Miles for Routes ON the NEC
(Sample Data)

Service	Host	Route Miles	Infrastructure Delays	Passenger-Commuter Train Interference	3rd Party Delays	All Other Delays
Acela Express	Minimum Standard - Delays Below		104	67	37	76
	XXX *	XX	118	54	88	184
	XXX *	XX	168	328	48	143
Other Services	Minimum Standard - Delays Below		123	114	44	187
Northeast Regional	XXX *	XX	151	128	77	288
	XXX *	XX	229	483	93	307
Keystone	XXX	195	91	100	73	166
Cardinal	XXX	226	73	179	187	634
Carolinian	XXX	226	74	137	78	276
Crescent	XXX	226	80	193	87	338
Palmetto	XXX	226	74	43	31	263
Pennsylvanian	XXX	195	83	93	19	245
Silver Meteor	XXX	226	71	284	32	387
Silver Star	XXX	226	107	181	78	336
Vermonter	XXX *	XX	167	139	86	229
	XXX *	XX	328	919	119	488

Table 3 and Table 4 show proposed standards for train delays by type. In the tables, historical values that would have exceeded such a standard, had it been in place, are shown in bold face. These proposed standards reflect extensive statistical research performed by Amtrak in 2008. In order to establish standards for train delays, regressions were run to determine the correlation between percent on time and delay minutes per 10,000 train-miles. Separate studies were undertaken for NEC and off-NEC routes, in order to account for the difference in how delays are measured in the NEC as well as the desire to set somewhat tighter standards for NEC operations than for host railroad operations. Details on the statistical basis of the delay standards appear in Annex A.

Table 5 recapitulates the proposed standards for train delays. It shows the proposed standards, which are based on the regressions described in Annex A. The OTP percentages driving the allowable delay minutes are less stringent than those applied in the OTP tests; this

slight relaxation implements the basic principle that the standards should be realistically achievable and motivational in nature.

Table 5: Proposed Standards for Train Delays by Route

Route and Delay Category	*Proposed Standards for All Years (2009 through 2013)*	
	Delays per 10,000 train-miles (min.)	*Based on OTP standard*
All routes off the NEC		*80%*
Amtrak-responsible delays	*250*	
Host-responsible delays	*700*	
NEC routes:		
Acela		*90%*
Infrastructure delays	*104*	
Passenger/Commuter	*67*	
Train Interference	*37*	
3rd Party Delays	*76*	
All Other Delays		
All other NEC routes		*85%*
Infrastructure delays	*123*	
Passenger/Commuter	*116*	
Train Interference	*44*	
3rd Party Delays	*187*	
All other delays		

Other Service Quality Indicators

Although the establishment of metrics and standards for more subjective features of the intercity passenger rail experience presents challenges, the PRIIA is explicit on the point that standards shall be set—and used for a variety of purposes, including enforcement (Sections 210 and 222). Moreover, these subjective features of the

passenger experience have intrinsic importance in view of Amtrak's fundamental responsibility for the well-being of its passengers.

In essence, there are three ways of ascertaining Amtrak's success in providing a satisfactory passenger experience:

- Through survey data, such as Amtrak's Customer Service Index (CSI);
- Through objective data that may shed light on quantifiable features of, or surrogates for, the passenger experience; and
- Through comment letters, such as arrive in Amtrak's customer relations department daily.

Survey Data

The CSI. Since 1995, Amtrak has measured the adequacy of its intercity passenger train service through its Customer Satisfaction Index (CSI), which is based on responses from mailed surveys. Each month, Amtrak sends out 14,300 surveys to previous customers of all Amtrak routes requesting feedback on the quality of service that was provided. The survey, which identifies the origin city, destination city, and the travel date of the previous customer, asks respondents to rate their satisfaction with Amtrak's service on an eleven-step scale. Amtrak considers a response on the top three steps of the scale as being "very satisfied." Amtrak also reports an average which is based on a average of all the responses to a survey. The survey asks service-specific questions that fall into six basic categories: overall assessment of Amtrak's service; information provided by Amtrak; friendliness/helpfulness of Amtrak employees; comfort of the train; cleanliness of the train; and the food

service on the train (see Table 6). In addition, the survey form asks about the passenger's perception of OTP (for which direct, objective measures exist on a daily basis), and his or her impression of the value of service received for the price paid (which mixes marketing with service quality aspects). These survey questions are reviewed every few years by Amtrak to ensure that results remain applicable and insightful. The current survey used for the CSI has been in use without modification for several years.

Table 6: Amtrak CSI Service Quality Assessment Areas

Overall perception of Amtrak Service
Overall satisfaction with Amtrak based on this trip
Willingness to recommend Amtrak to others based on this trip
Information Provided by Amtrak
Accuracy of information received about the train trip prior to boarding the train
Information given on the train about services/features/ safety
Information given about problems/delays while on train
Clarity of announcements on the train
Friendliness/helpfulness of Amtrak Personnel
Friendliness/helpfulness of station personnel at boarding station
Friendliness/helpfulness of food service personnel on the train
Friendliness/helpfulness of the train conductors
On-Board Comfort
Comfort of seating area/room on the train
Smooth and comfortable train ride

Air temperature on the train
On-Board Cleanliness
Overall cleanliness of the train interior
Cleanliness of train windows
Cleanliness of the restrooms on the train
Smell of restrooms on the train pleasant/free of odor
On-Board Food Service
Availability of food service on the train
Quality/freshness of food on the train
Variety of food selections on the train

Importantly, the CSI addresses only a part of the passenger experience. The following table again shows those aspects of the passenger experience for which Amtrak is responsible, and counts the number of CSI questions addressing each:

Phase	Amtrak Responsibilities Shown in Black			
	At home or office	On access/ egress mode(s)	At station	On train
Information—passenger inquires about intercity services and access/egress to and from them; obtains real-time travel information	1		1	
Reservations/ ticketing/ticket verification—passenger plans trip, buys transportation, and has transportation checked			1	1

Phase	Amtrak Responsibilities Shown in Black			
	At home or office	On access/ egress mode(s)	At station	On train
Access—passenger reaches originating station, waits for train, boards				
Accommodation—passenger's creature comforts, necessities, and effects are provided for				
Movement–passenger undergoes movement				
Egress—passenger deboards train, traverses station, reaches destination				
Totals by Location	1	0	3	16

Notes: * Both refer to the same question, "accuracy of information received about the train trip prior to boarding the train." ‡ Both refer to the same question, "friendliness/ helpfulness of station personnel at boarding station."

Of the substantive questions on the questionnaire, 16 pertain to on-board information, ticket verification, accommodation, and OTP; three apply to stations, with no questions on station accommodations including basics like heat and restrooms; and one, to pre-trip planning information. There is also no question dealing specifically with sleeping car service, even though it accounts for significant revenue on a number of routes, and imposes a large price differential on its patrons. Of course, no questions deal with areas that are often outside Amtrak's direct control, like modes of access to stations, commuter rail connections, and parking—all of which are, however,

critical to many travelers' mode choice decisions.[14] Thus, while offering insights into important aspects of the passenger experience, the CSI is of somewhat limited scope.

Mechanics of the CSI Survey. Amtrak over the past two years has received approximately 4,200 survey responses a month. The responses are summed by service type (i.e. Northeast Corridor, State supported/other corridor trains, long distance trains, and the entire Amtrak system) and are broken out for each individual route. The tabulations for the service types and routes show the percent of "very satisfied" responses (top thress steps on the eleven-step scale), the percent of "very dissatisfied" responses (bottom three steps), the average score for each inquiry on the survey, and the percent change from the previous year's scores. The data tables show the most recent monthly data, the most recent three month averages, and the year to date averages. In terms of the survey results, Amtrak usually receives higher scores for the information it provides and the helpfulness of Amtrak employees while the topics of restrooms, food, and clarity of announcements tend to receive lower scores. Table 7 shows Amtrak's CSI for the *Blue Water* service for November 2008.

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[14] See, for example, National Analysts, Inc. for the U.S. Department of Transportation, *The Needs and Desires of Travelers in the Northeast Corridor: A Survey of the Dynamics of Mode Choice Decisions*, February 1970, available at http://www.fra.dot.gov/us/content/1596.

Table 7: Amtrak CSI for *Blue Water* Service for November 2008

(Numbers in parentheses in column headings refer to steps on the CSI's eleven-step rating scale.)

Blue Water

FY09 Customer Satisfaction Scores (with change vs year ago)
FY09 Overall Customer Satisfaction Goal (% Very Satisfied): 82%

	November 2008						3 Month Average						Fiscal Year to Date					
	% Very Satisfied (8, 9, 10)		% Very Dissatisfied (0, 1, 2)		Average Score		% Very Satisfied (8, 9, 10)		% Very Dissatisfied (0, 1, 2)		Average Score		% Very Satisfied (8, 9, 10)		% Very Dissatisfied (0, 1, 2)		Average Score	
	CSI	Chg	CSI	Chg	CSI	Chg	CSI	Chg	CSI	Chg	CSI	Chg	CSI	Chg	CSI	Chg	CSI	Chg
Overall CSI	83%	+4	1%	0	89	+6	75%	-2	4%	+2	83	0	77%	-1	4%	+2	84	+1
Friend/Helpful of Boarding Sta. Personnel	83%	+9	5%	+3	86	+4	79%	0	4%	+1	85	0	82%	+4	3%	-1	86	+3
Friend/Helpful of Train Conductors	86%	+10	2%	+1	88	+4	78%	-4	3%	+1	85	-2	78%	-1	2%	-1	86	+1
Friend/Helpful of Food Personnel	82%	-2	1%	+1	88	0	76%	-6	4%	+2	84	-3	79%	-5	2%	0	86	0
Top Info Prior to Boarding Train	91%	+5	0%	-2	93	+6	87%	-1	3%	+1	89	0	89%	+2	0%	-1	91	+2
Info Given on Services Safety	80%	+3	1%	0	86	+1	72%	-4	3%	0	82	-2	74%	-3	1%	-2	83	-1
Info Given on Problems/Delays	76%	+8	4%	+2	82	+4	67%	-3	6%	+4	77	-3	70%	-1	6%	+1	79	-1
Clarity of Announcements	68%	+10	3%	-5	80	+8	56%	-4	8%	0	72	-1	60%	+3	5%	-4	74	+2
Comfort of Seating Area/Room	81%	+2	1%	+1	86	0	86%	0	2%	0	85	-1	77%	-1	0%	-2	85	-1
Smooth/Comfortable Ride	84%	+4	1%	+1	87	0	81%	-1	2%	+1	85	-2	81%	-4	1%	-1	85	-3
Air Temperature	81%	+14	[illegible]	0	85	+6	75%	-1	4%	+1	82	0	76%	+2	3%	-1	84	+3
Overall Cleanliness of Train	78%	+3	1%	-1	83	+1	73%	-2	3%	0	80	-2	73%	0	2%	-2	81	0
Cleanliness of Train Windows	62%	-1	1%	-2	78	0	61%	-3	4%	0	76	-3	58%	-4	4%	0	75	-2
Restroom Cleanliness	58%	+5	6%	-1	75	+2	56%	-2	8%	+2	72	-1	56%	-3	7%	+1	73	0
Restroom Odor	62%	+2	7%	-1	74	0	58%	-3	9%	+1	72	-1	60%	-2	9%	0	73	-1
Availability of Food	79%	+8	1%	-4	86	+6	58%	-5	3%	-1	80	-1	70%	-2	3%	-1	80	-1
Quality/Freshness of Food	65%	-4	4%	+1	79	+1	56%	-3	6%	+2	74	-2	58%	-5	6%	+2	75	-2
Variety of Food	49%	-2	5%	0	72	+1	44%	-3	13%	+5	67	-4	44%	-4	10%	+4	67	-4
On-Time Performance	64%	+32	12%	-12	73	+20	48%	+3	21%	-4	61	+3	62%	+12	10%	-6	63	+7
Value of Amtrak Service for Price Paid	91%	+8	1%	0	91	+3	82%	-2	3%	+1	89	-2	85%	+1	1%	-1	88	+1
Number of Responses in Current Period	83						325						200					
Number of Responses Year Ago	82						202						195					

Amtrak primarily looks at the CSI's three month averages, which ensures a robust sample size and thus greater statistical validity Amtrak does however, report CSI data on a monthly, three-month rolling average and fiscal year to date basis. CSI data are widely used by Amtrak management to both identify service shortfalls and to set targets for improving service on a annual basis. For example, consistently low restroom cleanliness scores on the *Hiawathas* led Amtrak to hire restroom cleaning crews to service the toilets during the day. Amtrak noted that low scores in Amtrak employee service can be helpful in initiating efforts that improve the service of employees.

CSI Goals. Amtrak's Product Management and Customer Service staff establish fiscal year goals for each route based on previous year performances and future factors that are expected to affect route performance (e.g. the expectation of significant track work in the upcoming year). The goal is to have continuous improvement on each route, which typically equates to route scores improving by a couple of percentage points per year, although in some cases goals may not be set higher. For example, the Acela goal for the current fiscal year was actually decreased because an ongoing concrete tie replacement project is projected to reduce OTP and lengthen trip times. Since OTP and the overall CSI are so closely linked, Amtrak management thought it counterproductive to set a goal that the company could not meet Highlighting Amtrak's efforts to continually improve its service, Amtrak's Overall CSI score reached 80 percent in 2008; an increase of eight percentage points since 2004.

Limitations of the CSI. Amtrak's CSI survey has a number of limitations. Passenger responses in all areas

correlate strongly with on-time performance: Customers tend to have diminished perceptions of Amtrak's services when trains are late, typically resulting in lower CSI scores from respondents across the board. As a result, Amtrak encounters difficulties in gauging whether a low score for on-board services truly reflects substandard performance by staff and equipment, or whether the score represents passenger anger over the train's lateness. Another limitation is that the survey instrument has no space for a free response, which would allow respondents to specifically identify problems that Amtrak personnel can in turn act upon. Finally, Amtrak differentiates its survey responses by service class on the *Northeast Regional* and *Acela* services for the use of NEC Customer Services. Currently, surveys are sent separately to long distance passengers in coach versus sleeper accommodations, but the results are not reported separately because of significant sample size limitations.

Overview of the CSI. In conclusion, Amtrak's CSI provides only a very high-level overview of customer satisfaction. The survey results are heavily weighted towards the train on-board services and are significantly impacted by the train's on-time performance. In addition, there are a number of limitations in how the data can be analyzed and in the types of improvements that can stem from the survey results. However, collecting data on the adequacy of Amtrak's service is a very resource-intensive effort and Amtrak's CSI is an available, if imperfect, proxy for this important information.

CSI Metrics and Standards. Each of the following metrics would be the simple average of each group of questions. For the groups, see Table 6 above, "Amtrak CSI Assessment Areas."

- Percent of passengers "very satisfied" with overall Amtrak service.
- Percent of passengers "very satisfied" with Amtrak personnel.
- Percent of passengers "very satisfied" with information given.
- Percent of passengers "very satisfied" with onboard comfort.
- Percent of passengers "very satisfied" with onboard cleanliness.
- Percent of passengers "very satisfied" with onboard food service.

As indicated above, there are insufficient CSI data to create metrics regarding stations and sleeping cars, as the entire topic of station accommodations is omitted from the CSI. The FRA and Amtrak intend to remedy this lacuna by adding the following metrics:

- Percent of passengers "very satisfied" with the overall station experience.
- Percent of passengers "very satisfied" with the overall sleeping car experience.

Proposed Standards for CSI metrics. *For FY 2009, Amtrak and the FRA propose to adopt a minimum standard for each CSI-based metric of 80 percent "very satisfied" in FY 2009 and 90 percent in FY 2013; except that the "Overall perception of Amtrak service" would have an 82 percent standard in FY 2009 and 90 percent in FY 2013.*

Objective Data

Insight on the passenger experience can also arise, under certain circumstances, by means of statistical data on the company's operations. As Section 222 of the Act places special emphasis on on-board services, as a foundation of on-board service is the quality of the coach, sleeper, diner, and lounge equipment, and as the Mechanical Department—responsible for equipment—keeps detailed records of its affairs, Mechanical Department data may offer special opportunities for use in these metrics, as an objective supplement to CSI data.

Amtrak's Mechanical Department has developed a measure, "equipment-caused service interruptions per 10,000 train-miles," that will offer some insight into the reliability and soundness of the fleet **as experienced by passengers.**[15] In this proposed metric, a "service interruption" is defined as follows:

1. Any late train departure at origin due to an equipment problem with a delay greater than Amtrak's performance standard of service.
2. Any late train arrival at destination greater than Amtrak's performance standards of service due to an equipment problem.
3. Any en-route termination due to an equipment problem.
4. Any unplanned cancellation of any train due to an equipment problem.

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[15] Safety—although always of supreme importance—does not enter into these particular Metrics and Standards, and there is no intention to duplicate the exhaustive and ongoing collection of safety data by the FRA's Office of Safety.

Each event will be counted but duplicate or related events will be counted once. An individual train that experiences problems will be counted once as the reporting is repeated for the same issue over the route. A train that leaves on time and arrives at destination on time but experiences minor mechanical delays in-route will be excluded.

All train problem events will be summed over a calendar month period. Amtrak will then take the total mileage operated during the same period and divide the mileage by 10,000 to normalize the metric. Data will be provided on a route-by-route basis.

The FRA and Amtrak intend to provide this metric for information, instead of attaching a standard to it, as insufficient historical data exist on which to base such a standard. In addition, the Mechanical Department is continuing to research methods of focusing more intensively on the quality of the passenger experience aboard Amtrak's rolling stock. As improved measures become possible, they will be considered for incorporation into the regularly reported metrics.

Comment Letters

The U.S. Department of Transportation's Aviation Consumer Protection Division publishes a comprehensive monthly report on airline service quality. The report contains the following sections[16]:

- Flight Delays;
- Mishandled Baggage;

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[16] The report is available at http://airconsumer.ost.dot.gov/reports/index.htm

- Oversales;
- Consumer Complaints;
- Customer Service Reports to the Dept. of Homeland Security; and
- Airline Animal Incident Reports

The Consumer Complaints section tabulates the number of complaints to each air carrier, by cause. It also reports, for each airline, the number of complaints per 100,000 enplanements. This section of the aviation report incorporates, in addition to complaints, "opinions," "comments," and "information requests" that are received.

Amtrak similarly collects and tabulates passenger reactions to its service—both positive and negative—that it receives via letters, e-mails, and telephone calls. While this information cannot possess statistical validity, in that only a motivated subset of passengers (particularly unhappy customers) will share their impressions of Amtrak's service, the data provide an additional prism—beyond the CSI and available objective reports—through which to assess the quality of the intercity rail passenger experience. For this reason, and on the analogy of the airline data that the Department of Transportation already shares with the public, the FRA and Amtrak are proposing to include in the quarterly metrics report a statistical summary of passenger comments received by Amtrak. As a means of reporting and characterizing both lapses and successes in customer service, this summary would provide a tabulation of both the positive and negative comment letters by subject matter. Route-by-route tabulations will not be provided, as such data may be regarded as too volatile—too dependent on specific incidents—to be of indicative value. However, on the

analogy of the airline reports that provide data by carrier, it is proposed to break down the data by Amtrak's three major route groupings (Northeast Corridor routes, other corridors, and long-distance routes) as well as the system as a whole. The specific proposal is as follows:

For the System and the three route groupings, the tabulation would provide:

a. Total comments received

b. Distribution by type of comment (praise, inquiry, suggestion, or complaint);

c. Number of comments, by type, per 1000 passenger-trips (analogous to the "complaints per 100,000 enplanements" in the aviation report); and

d. For complaints, distribution by cause. Annex B provides the list of train- and station-related causes that Amtrak uses to classify complaints. Additional major cause categories include "Bus service," "checked baggage/express," and "marketing and sales."

In view of the lack of statistical validity inherent in the comment letters, the FRA and Amtrak propose to provide these data for information only. We do not propose to set a standard based on the analysis of comment letters described above.

Indicators of Service Availability/Connectivity

Measures of Connectivity with other routes for Long Distance Trains

The reauthorization statute specifies that Amtrak and FRA must include, "For long-distance routes, measures

of connectivity with other routes in all regions currently receiving Amtrak service."

Amtrak currently produces an annual report showing connectivity between all its routes each fiscal year, and has agreed to share the data with FRA for long distance routes. As Amtrak's analysis of these numbers shows that there are no significant changes from year to year, it is reasonable to assume that there is no significant variation from quarter to quarter. In addition, the report is data-intensive; to require it quarterly would entail considerable expense with little benefit. Accordingly, the FRA and Amtrak are proposing to use Amtrak's annual data which is updated after the end of each fiscal year. (Applicable data would, however, be included in each self-contained quarterly report.)

Thus, the metric would be, for each long-distance route: "Percent of passengers connecting to and from other routes in the Amtrak network."

With respect to a standard for this measure: Connectivity depends on the service that is offered (routes and frequencies) and the quality of that service (on-time performance especially). Amtrak currently has little flexibility to add routes and frequencies that would enhance connectivity; accordingly, any standards that might be proposed for connectivity improvement *per se* would not be realistically achievable within the planning horizon of the PRIIA authorization Of course, OTP is measured separately and in great detail; and improvements in OTP would provide the best surrogate measure of improved connectivity for the time being.

Transportation Needs of Communities Not Well Served

For long distance routes, the PRIIA requires a metric to measure how long distance trains serve "the transportation needs of communities and populations not well-served by other forms of intercity transportation." If this provision were implemented literally, this requirement would require an in-depth and complicated study which the FRA and Amtrak lack the resources to complete.

The last comprehensive effort to determine where Amtrak trains provide the only scheduled intercity passenger transportation was completed in June 2005 by the Department's Bureau of Transportation Statistics. That study made no attempt to evaluate whether or not a community was "well-served" but rather if it was served at all. To build on this detailed approach would necessitate the creation of a definition of "well-served," followed by a comprehensive study of which of the communities served by Amtrak are not well-served. Such a detailed analysis would require many months and significant resources, and thus would not allow Amtrak and the FRA to meet the Congressional mandate.

Instead, the FRA and Amtrak propose to start with the assumption that all of rural America is underserved by public common-carrier transportation. Then we would identify the proportion of passengers by Amtrak route going to and from rural communities (which we would define, on a preliminary basis, as those places beyond 25 miles of a community of 50,000 or more). To do this, it is necessary to determine which stations serve rural areas before identifying the number of passengers going to/from those stations. The resulting metric would be, for each route, the "percent of passenger-trips involv-

ing rural origins and/or destinations." Preliminary analysis suggests that 132 of Amtrak's 500 stations serve "rural" communities; this analysis, and the definition of "rural" communities, will be refined prior to the issuance of the first report on the Act's Section 207 metrics and standards.

More detailed studies of this important topic might conceivably fall under the purview of the independent entity to be engaged to fulfill Section 208 of the Act ("Methodologies for Amtrak Route and Service Planning Decisions"). For example, such an independent entity could be directed to study the issue of how increasing the number and frequency on Amtrak's long distance routes can improve service to rural communities that are not well served by other modes of scheduled intercity transportation.

It would be premature to set a standard for the "percent of passenger-trips involving rural origins and/or destinations" as this statistic—similar to that for connectivity—would not be under Amtrak's control in the short term. To raise that percentage would require either major changes in Amtrak's route structure and frequencies (for which funds do not exist, and which are the subject of investigation under Section 208 of the Act), or major scheduling changes that would assign better arrival/departure times at rural locations, to the possible detriment of major revenue-producing points.

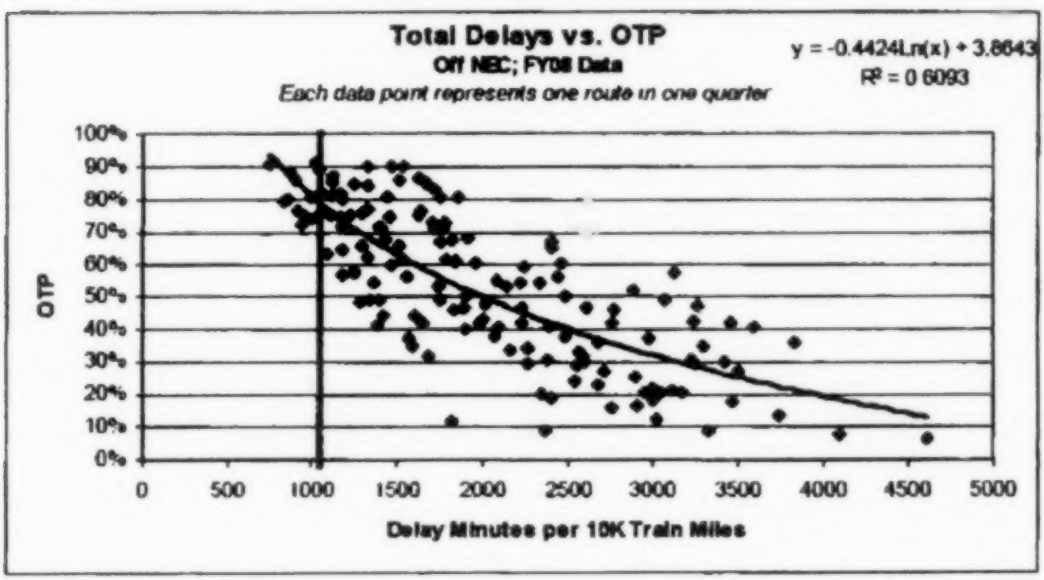
Annex A:
Standard-Setting for Delay-Minutes per 10,000 Train-Miles

In order to establish minimum standards for train delays, regressions were run to determine the correlation between percent on time and delay minutes per 10,000

train-miles. Separate studies were undertaken for Northeast Corridor and off-Northeast Corridor routes, in order to account for the difference in how delays are measured in the Northeast Corridor as well as the desire to set tighter standards for Northeast Corridor operations than for host railroad operations.

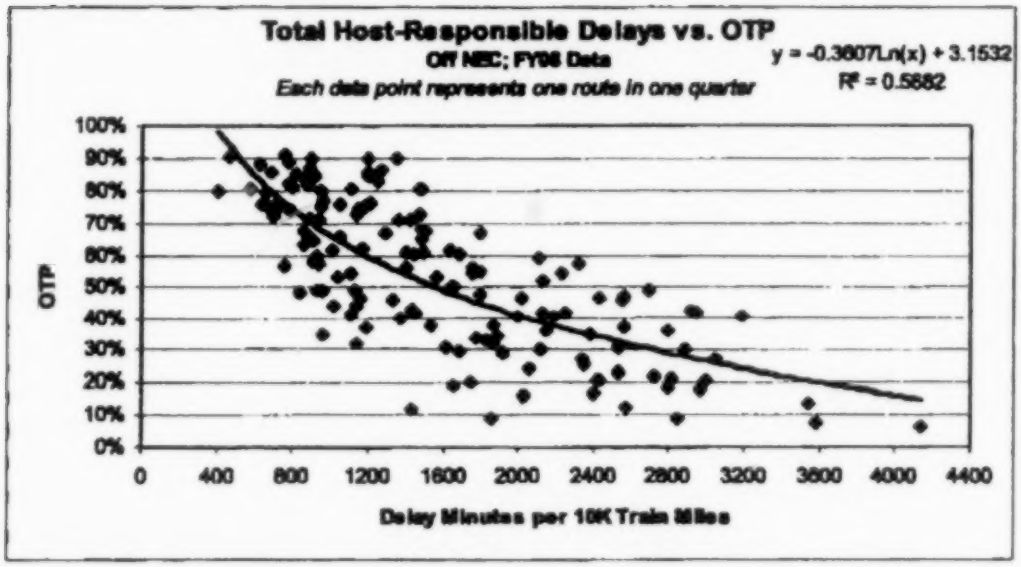
Off the Northeast Corridor, it was determined that 1,030 minutes of delay per 10,000 train miles correlates with an 80 percent endpoint on time arrival rate (see Figure A-1). After rounding up to 1,050 minutes, this delay must be apportioned between Host, Amtrak, and 3rd Party responsible causes.

Figure A- 1: Total Delays off the NEC Corridor vs. Percent On Time



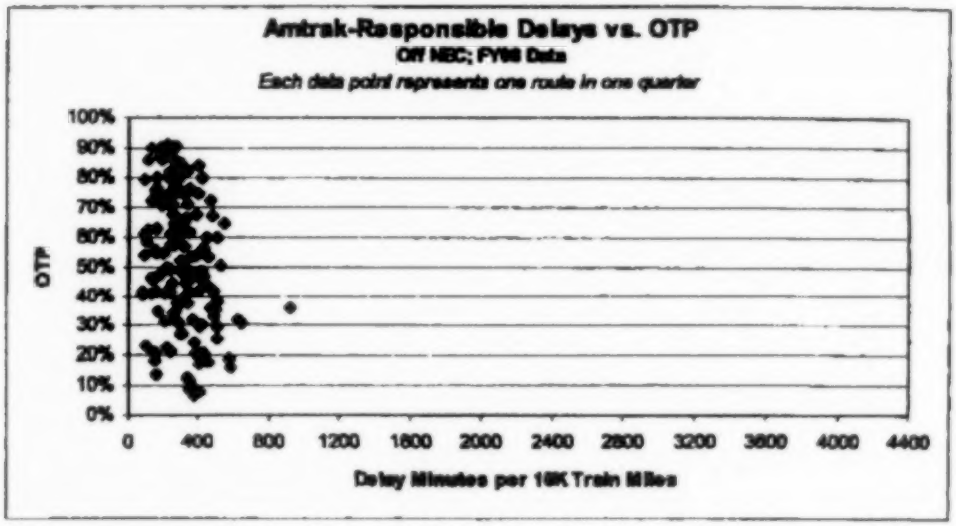
Regressions were then run to determine the relationship between host-responsible delays and OTP. This analysis found that 690 minutes of host-responsible delay per 10,000 train miles correlates with 80% OTP (Figure A-2). This number was rounded up to generate the standard of 700 minutes per 10,000 train miles.

Figure A- 2: Total Host Responsible Delays off the NEC Corridor vs. Percent On Time



As illustrated in Figure A-3, Amtrak-responsible delays off the Northeast Corridor are not a large enough portion of total delays to independently drive OTP up or down. Therefore, the non-Host delays (1,050 – 700 = 350 mins) were apportioned between Amtrak and 3rd Party responsibility based on historical experience. During Amtrak's FY 2008, Amtrak delays represented 70% of combined Amtrak and 3rd-Party (i.e., non-Host) delay minutes. The standard for Amtrak-responsible delays is therefore set as 70% of 350 minutes = 245 minutes, rounded up to 250 minutes per 10,000 train miles.

Figure A- 3: Amtrak Responsible Delays off the NEC Corridor vs. Percent On Time



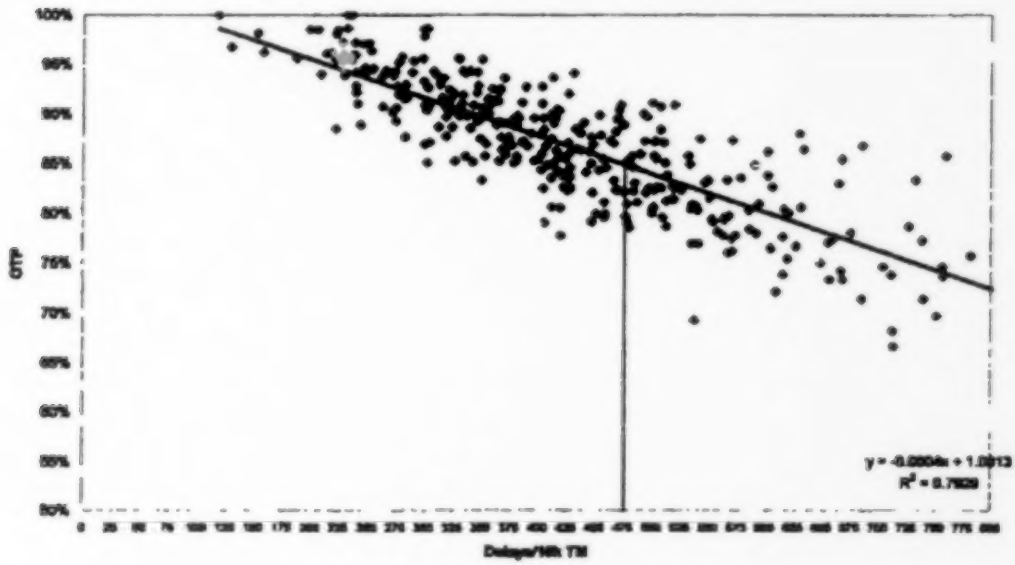
Similar regression studies were undertaken to determine the correlation between endpoint on-time performance and minutes of delay on the Northeast Corridor. Two separate studies were completed, one for Acela Express service using a 90% endpoint arrival rate and one for Northeast Regional/Keystone services using an 85% endpoint arrival rate.

An existing Acela Express mathematical regression model was applied using daily FY08 data to determine the minutes of delay threshold that correlates to 90% endpoint on time performance. It was determined that 285 minutes of delay per 10,000 train miles correlates with a 90% endpoint on time arrival rate. Delays per 10,000 train miles were then apportioned across the delay categories based on minutes of delay incurred by each category in FY08.

The Keystone & Northeast Regionals On Time Performance (OTP)-Delay study used daily performance and delay data from FY08. The study evaluated the relationship between OTP and delays. OTP was defined as the

share of trains that arrived at endpoint within their endpoint tolerance for a particular day and delays were defined as total delay minutes incurred normalized to 10,000 miles operated. The OTP and delay data were plotted and the relationship (shape, slope, intercept, R^2) calculated. The total delay target of 470 minutes of delay per 10,000 train miles was derived by finding the total delays incurred on days when endpoint arrival performance was 85% or better. It was determined that 470 minutes of delay per 10,000 train miles correlates with an 85% endpoint on time arrival rate (Figure A-4). Delays per 10,000 train miles were then apportioned across the delay categories based on minutes of delay incurred by each category in FY08.

Figure A- 4: Total Delays on Northeast Regional & Keystone Service on the NEC Corridor vs. Percent On Time



Annex B

Amtrak's System for Classifying Station- and Train-Related Complaints

STATION	FACILITY	ADA ISSUES
		CLUB ACELA
		ELEVATOR, ESCALATOR UNAVAILABLE
		ENVIRONMENTAL ISSUE
		LOCATION INCONVENIENT
		LOCKERS INADEQUATE
		LUGGAGE SCREENING
		METROPOLITAN LOUNGE
		NO CHECKED BAGGAGE
		PARKING FACILTIES
		PUBLIC TELEPHONE/TTY
		QUIK TRAK
		RESTROOMS DIRTY/ UNSTOCKED
		SCHEDULES/BROCHURES UNAVAILABLE
		SECURITY/SAFETY ISSUE
		SIGNAGE
		STATION DIRTY/ UNMAINTAINED
		STATION HOURS
		STATION UNSTAFFED
		TAXIS UNAVAILABLE
		TRAIN INFORMATION DISPLAY
		WAITING ROOM UNSATISFACTORY
	PERSONNEL	ASSISTANCE - ADA
		ASSISTANCE - GENERAL

		COMMUNICATIONS PROBLEM
		DIVERSITY ISSUE
		EMPLOYEE ACTIONS UNSAFE
		POOR UNIFORM/GROOMING
		PHOTO ID CHECK
		RUDE
		SLOW/INEFFICIENT/ UNHELPFUL
		TICKET PROBLEM
		UNAVAILABLE
		UNSATISFACTORY SERVICE RECOVERY
TRAIN	AMENITIES	BEVERAGE
		BLANKET
		GIFT
		MEAL
		NEWSPAPER
		ON-BOARD ENTERTAINMENT
		PILLOW
		WAKE-UP CALL
	DINING SERVICES	ADA ISSUES
		DINER - TEST
		FOOD DEPLETED
		FOOD POISONING
		FOOD SELECTION
		FOOD/SERVICE UNSATISFACTORY
		FULL DINING SVC NOT OFFERED
		HOURS UNSATISFACTORY

	MENU UNAVAIL FOR MOB IMP PRICING
	SLOW SERVICE
	SPECIAL MEAL NOT PROVIDED
	TABLE SEATING UNSATISFACTORY
EQUIPMENT	ACCOMMODATION UNSATISFACTORY
	ADA ISSUES - ACCOMODATIONS
	ADA ISSUES - COACH
	ADA ISSUES - DINER
	ADA ISSUES - LOUNGE
	BED MALFUNCTION
	CALL BUTTON INOPERABLE
	CAR PLACEMENT UNSATISFACTORY
	CLIMATE CONTROL
	DOOR MALFUNCTIONING
	ELECTRICAL POWER NOT AVAILABLE
	ENVIRONMENTAL ISSUE
	HEADREST COVERS
	LIGHTING PROBLEM
	MULTIMEDIA PROBLEM
	COMMUTER EQUIPMENT UNSATISFACTORY
	PUBLIC ADDRESS PROBLEM
	RAILFONE SERVICE
	RESTROOMS - DIRTY
	RESTROOMS - MALFUNCTIONING

	RESTROOMS - NOT STOCKED
	RESTROOMS - ODORS
	RESTROOMS - UNSATISFACTORY
	ROUGH RIDE
	SAFETY ISSUE
	SEAT UNCOMFORTABLE
	SEAT/LEG REST BROKEN
	SHOWER MALFUNCTION
	SUBSTITUTION UNACCEPTABLE
	TRAIN DIRTY - EXTERIOR
	TRAIN DIRTY - INTERIOR
	UNAVAILABLE - ACCOMMODATION
	UNAVAILABLE - DINER
	UNAVAILABLE - LOUNGE
	UNAVAILABLE - SPECIALTY CAR
	UPPER BERTH UNSATISFACTORY
	VERMIN/RODENTS
	WATER - NO HOT WATER
	WATER - NO WATER
	WINDOWS SCRATCHED/ DIRTY
CUSTOMER PROBLEM EN ROUTE	ACCOMMODATION SIZE UNSATISFACTORY
	ADA - SERVICE ANIMAL ISSUE
	ADJACENT SEATING
	CAR DAMAGED/PILFERAGE
	CELL PHONE USE

	DAMAGED CARRY-ON/ CLOTHING
	DEA INTERDICTION
	EXCLUSIVE OCCUPANCY - GROUP
	CUSTOMER INJURED
	CUSTOMER REMOVED FROM TRAIN
	LOST/STOLEN CARRY-ON
	LOWER LEVEL SEATING
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	SEATING CONFIGURATION UNSATISFACTORY
	SECURITY ISSUE
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	SSR – ADA
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	FOOD POISONING
	FOOD SELECTION
	FOOD UNSATISFACTORY
	HOURS UNSATISFACTORY
	MENU UNAVAILABLE FOR MOBILITY IMPAIRED
	PRICING
PERFOR-MANCE	SLOW SERVICE
	ALTERNATE TRANSPORTA-TION PROVIDED
	ANNULLED/DISRUPTION
	LATE TRAIN

	MISSED TRAIN CONNECTION
	ONBOARD DELAY LETTER
	SERVICE DISRUPTION MISHANDLED
PERSONNEL	ASSISTANCE - ADA
	ASSISTANCE - GENERAL
	CARRY-BY
	COMMUNICATIONS PROBLEM
	DIVERSITY ISSUE
	EMPLOYEE ACTIONS UNSAFE
	ONBOARD TICKET PROBLEM
	POOR UNIFORM/GROOMING
	RUDE
	SLOW/INEFFICIENT/ UNHELPFUL
	SMOKING POLICY ENFORCEMNT
	UNAVAILABLE
	UNSATISFACTORY SERVICE RECOVERY

[Published in *Federal Register*: Mar. 13, 2009]

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA-2009-0016]

Metrics and Standards for Intercity Passenger Rail Service Under Section 207 of Public Law 110-432

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice and request for comments.

SUMMARY: In compliance with section 207 of the Passenger Rail Investment and Improvement Act of 2008 (Division B of Pub. L. 110-432), the FRA and the National Railroad Passenger Corporation (Amtrak) have jointly drafted performance metrics and standards for intercity passenger rail service, and are requesting comments on that draft from the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers. The draft document, entitled "Proposed Metrics and Standards for Intercity Passenger Rail Service," is available on the FRA's Web site at *http://www.fra.dot.gov/us/content/2165*. Comments may be submitted to the corresponding docket (number FRA-2009-0016) at regulations.gov and will be considered before the finalized Section 207 metrics and standards are adopted.

DATES: The comment period will commence on Friday, March 13, 2009 and Comments must be received by Friday, March 27, 2009. Comments received after that date

will be considered to the extent possible without incurring additional expenses or delays.

ADDRESSES: Comments for Docket No. FRA-2009-0016 should be filed at the Federal portal *http://www.regulations.gov.* Follow the Web site's online instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Neil E. Moyer, Chief, Intercity Passenger Rail Analysis Division, U.S. Department of Transportation, Federal Railroad Administration (e-mail *Neil.Moyer@dot.gov*; telephone 202-493-6365); or Ed Courtemanch, Sr. Principal, Operations Service Planning, Amtrak (e-mail *CourteE@amtrak.com*; telephone 202-906-3249).

Issued in Washington, DC, on March 9, 2009.

Neil Moyer,

Chief, Intercity Passenger Rail Analysis Division.

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[May 12, 2010]

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA-2009-0016]

Metrics and Standards for Intercity Passenger Rail Service

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Response to Comments; Issuance of Metrics and Standards

SUMMARY: Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (Division B of Pub. L. 110-432) (PRIIA) charged the Federal Railroad Administration (FRA) and Amtrak jointly and in consultation with other parties, with developing new or improving existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations. In compliance with the statute, the FRA and Amtrak jointly drafted performance metrics and standards for intercity passenger rail service and, on March 13, 2009, posted a draft document, entitled "Proposed Metrics and Standards for Intercity Passenger Rail Service," on the FRA's Web site at http://www.fra.dot.gov/us/content/2165. Simultaneously, the FRA published a notice in the *Federal Register* (74 FR 10983) requesting comments on the Proposed Metrics and Standards from the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers. Seventeen comments were submitted to the corresponding docket (number FRA-2009-

0016) at regulations.gov by the end of the comment period on March 27, 2009 and as a result, revisions have been made to the Metrics and Standards. The Final Metrics and Standards are included at the end of this document.

DATES: These metrics and standards are in effect as of May 12, 2010.

FOR FURTHER INFORMATION CONTACT: Neil E. Moyer, Chief, Financial and Economic Analysis Division, Office of Passenger and Freight Programs, Federal Railroad Administration (e-mail Neil.Moyer@dot.gov; telephone 202-493-6365); or Edgar E. Courtemanch, Sr. Principal, Operations Service Planning, Amtrak (e-mail CourteE@amtrak.com; telephone 202-906-3249).

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I. Background

Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (Division B of Pub. L. 110-432) (PRIIA) charged the Federal Railroad Administration (FRA) and Amtrak with jointly developing, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, new or improving existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services. The statute further provided that such metrics shall, at a minimum, include the percentage of avoidable and fully allocated operating costs covered by passenger revenues on each route, ridership per train-mile operated, mea-

sures of on-time performance and delays incurred by intercity passenger trains on the rail lines of each rail carrier and, for long-distance routes, measures of connectivity with other routes in all regions currently receiving Amtrak service and the transportation needs of communities and populations that are not well-served by other forms of intercity transportation.

In compliance with the statute, the FRA and Amtrak jointly drafted performance metrics and standards for intercity passenger rail service and, on March 13, 2009, posted a draft document, entitled "Proposed Metrics and Standards for Intercity Passenger Rail Service," on the FRA's Web site at http://www.fra.dot.gov/us/content/2165. Simultaneously, the FRA published a notice in the *Federal Register* (74 FR 10983) requesting comments on the Proposed Metrics and Standards from the stakeholders named in the PRIIA. In total, seventeen comments were submitted to the corresponding docket (number FRA-2009-0016) at regulations.gov by the end of the comment period on March 27, 2009.

The FRA and Amtrak have considered the comments of the respondents to Docket No. FRA-2009-0016, and through this notice are issuing final Metrics and Standards for Intercity Passenger Rail Service. This document also contains the FRA's responses, developed with Amtrak's concurrence, to the docket comments. The changes incorporated in the Metrics and Standards published with this notice in some cases reflect clarifications of, and in others, revisions to, the March 13 proposal. A more detailed explanation of these changes is provided below.

II. Discussion of Comments and Revisions to the Proposed Metrics and Standards

A wide variety of interested parties submitted written comments to FRA in response to the Proposed Metrics and Standards. Comments were submitted to the docket from five State Departments of Transportation, three State and regional passenger railroad agencies, three freight railroads, three railroad-related associations, and one labor organization. FRA also received one comment from an individual of unknown affiliation, likely an interested private citizen, and one brief procedural comment from the Surface Transportation Board. A full list of the parties that submitted comments can be found in Annex 4.

The comments are categorized according to the four main topics identified in the Proposed Metrics and Standards document. An additional category was created to address comments and recommendations of a more general nature. Within each category, this Supplementary Information includes a comparison of the proposed with the final Metrics and Standards; a brief summary of the comments received; and a response to those comments. In many cases, a response is provided to individual comments; in other cases, where a common theme existed across two or more comments, the comment was consolidated and a single response provided. In both types of cases, we have noted where FRA and Amtrak have made changes to the Proposed Metrics and Standards based upon the comments and recommendations received.

The FRA and Amtrak sincerely appreciate the time and effort put forward by all participants in this effort.

A. General Comments on the Proposed Metrics and Standards

1. Procedural Comments

Implementation timing of Metrics and Standards. ***Comment:*** A procedural comment addressed the timing of the implementation of the metrics and standards and expressed concern that new performance measures will be applied retroactively to quarters prior to their finalization and implementation. ***Response:*** The FRA agrees that, in all fairness, stakeholders should only be held responsible for operations conducted following implementation of these Metrics and Standards. Accordingly, FRA will not publish the first quarterly report until the required data are available for the first full quarter following the publication of these Metrics and Standards. Thus, for example, if the present document is published by between April 1, 2010, and June 30, 2010, the first full quarter of effectiveness of the Metrics and Standards would extend from July 1, 2010 through September 30, 2010; data for that quarter would be obtained and analyzed, and the report would be prepared, in the subsequent weeks; and the first quarterly report would be published as soon as possible thereafter, and no later than January 1, 2011.

In keeping with the FY 2008 and successive appropriations acts, the FRA will continue to prepare and publish its quarterly On-Time Performance report until the quarterly reporting on these Metrics and Standards begins.

Reporting periods. ***Comment:*** The same party also noted that PRIIA only requires one quarter of data to be published in each quarterly report. ***Response:*** In actuality, the statute states that "[t]he Administrator of the

Federal Railroad Administration shall collect the necessary data and publish a quarterly report on the performance and service quality of intercity passenger train operations. . . ." That is, it says that the FRA will publish a quarterly report, not that it will publish a report containing a quarter's worth of data. Moreover, it is the FRA's position that for the metrics to be meaningful, it is necessary to collect and/or publish data for a variety of periods. For example, depending on the metric and the availability of comparable data, a typical quarterly report might show data for one or more of the following: (a) the quarter being reported upon, (b) the prior quarter (in the case of on-time performance data), (c) the four quarters ending with the quarter being reported upon, (d) the eight quarters ending with the quarter being reported upon (for rolling eight-quarter averages), and (e) the same periods detailed above ending one year previously.

Sufficiency of comment period. ***Comment:*** The Docket received two comments expressing concern with the stakeholder consultation that took place in developing the Proposed Metrics and Standards. In particular, the Transport Workers Union of America (TWU) stated that the 14-day period provided for submitting comments to the docket was inadequate and that any revisions to the Proposed Metrics and Standards document should incorporate a longer comment period (at least 30 days) with increased stakeholder involvement. ***Response:*** The FRA understands that some stakeholders would have liked more time to comment on the Proposed Metrics and Standards. However, the FRA and Amtrak have seriously considered all the comments submitted and believe that the Final Metrics and Standards document reflects a marked improvement over the original proposal. In addition, subsequent to the enactment of the PRIIA, the

American Recovery and Reinvestment Act of 2009 ("Recovery Act") allocated $8 billion in economic stimulus funding to a High-Speed Intercity Passenger Rail (HSIPR) investment program. As described in the strategic plan and guidance documents published by the FRA pursuant to the Recovery Act (and available at http://www.fra.dot.gov/us/content/31 and http://www.fra.dot.gov/us/content/2243, respectively), various partnerships and implementing agreements among the stakeholders will be prerequisite to achievement of the HSIPR program goals in most corridors. Essential to such implementing agreements will be a mutual knowledge of the operational performance expectations of the various parties. As benchmarks for many of these expectations will be established in these Metrics and Standards, their timely publication is essential to the early completion of State/rail owner/passenger operator negotiations and thus, to the speedy implementation of the HSIPR program.

Accordingly, the Metrics and Standards presented at the end of this notice represent the performance measures that the FRA and Amtrak will implement, and on which the FRA will base its quarterly report to Congress. The Metrics and Standards themselves identify specific topics within the Other Service Quality and Public Benefits categories that will require further analysis, proposals, and public comment.

2. Comments Regarding Penalties

Enforcement and penalties. ***Comment:*** Several parties submitted concerns regarding the enforcement of standards and the penalties for not meeting the standards. The TWU and multiple State agencies requested further explanation on how the metrics will be applied to routes as well as the outcomes for meeting and for not meeting

the standards. In particular, the TWU requested clarification regarding the enforcement mechanism for each standard as well as the name of the agency responsible for enforcement. It also requested details on the development of guidance for enforcement procedures. ***Response:*** As explained in the PRIIA, the Surface Transportation Board (STB) is the primary enforcement body of the standards, making them an appropriate entity to develop and communicate enforcement protocols.[1] As such, the FRA believes that the enforcement procedures are properly separate from these metrics and standards. The FRA's only enforcement responsibility pertains to performance progress analysis of the worst-performing long-distance routes as provided for in Section 210 of PRIIA (49 U.S.C. 24710). None of these routes is currently State-supported.

Susceptibility of routes to enforcement. ***Comment:*** **The California Department of Transportation** (Caltrans) questioned whether Amtrak routes themselves can be penalized for not meeting performance standards. ***Response:***

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[1] As explained in Section 213 of PRIIA, if service quality fails to meet the established standards for 2 consecutive calendar quarters, the STB may (and in some circumstances must) initiate an investigation to determine whether and to what extent this failure is due to causes that could reasonably be addressed by the host rail carrier or by Amtrak or other intercity passenger rail operators. If it determines that the failure to meet the standards is attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation, it may award damages against the host rail carrier, which the carrier shall remit either to Amtrak or to an entity for which Amtrak operates intercity passenger rail service as the STB deems appropriate.

Under Section 213 of PRIIA,[2] penalties for infraction of the standards are not intended for direct application to Amtrak routes, but rather to host rail carriers under specified circumstances. PRIIA Section 210 does give the FRA authority to withhold non-safety-related funds from a long-distance route that is among the worst performers under these Metrics and Standards, but only if that route fails to adhere to an Amtrak-devised performance improvement plan, and only after mandated notifications and an opportunity for Amtrak to request a hearing.

Effects of the standards on State-supported services. ***Comment:*** Washington State Department of Transportation (WSDOT) expressed concern that States funding Amtrak services could be penalized for underperforming routes and that such penalties could discourage future State support. WSDOT also inquired whether "credits" can be earned for routes that exceed performance standards. ***Response:*** PRIIA includes no provision imposing consequences or penalties on States, in their capacity as sponsors or subsidizers of intercity passenger services, if those routes fail to meet the standards specified in the Metrics and Standards. Similarly, PRIIA makes no provision for the awarding of credits for routes exceeding the standards. However, other benefits naturally accrue to States, Amtrak, and host railroads for outstanding performance, including lower-cost and/or higher-revenue operations, as well as heavier rail traffic volumes and consequent public benefits. Furthermore, the States, Amtrak, and host freight railroads are free to build direct

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[2] Section 213 describes Surface Transportation Board responsibilities for enforcement of the Metrics and Standards, particularly as they regard host rail carriers.

incentives into their agreements, and in some cases have already done so.

Uses of the performance measures. ***Comment:*** The Caltrans requested clarification on how the performance measures will affect Amtrak's and the FRA's decision-making authority on State-supported routes. Caltrans also asked whether the Proposed Metrics and Standards were designed to compare routes against their own past performance or against those of other routes. ***Response:*** The Metrics and Standards are designed to allow for both historical and cross-sectional analysis and comparisons. In addition to their general use and utility, PRIIA mandates that Amtrak use them in evaluating its long-distance routes (Section 210) and in developing a plan to improve on-board service (Section 222), and that FRA use them in evaluating bids under the Alternate Passenger Rail Service Pilot Program (Section 214).

3. Concerns with Metrics and Standards Data

Independence and data integrity. ***Comment:*** One commenter was concerned about the lack of independence with respect to the gathering of data for and the calculation of the Proposed Metrics and Standards. In particular, the commenter suggested that insufficient separation exists between Amtrak personnel and the data used for these performance measures. Another party stated that sole use of Amtrak-provided operational and performance data is not justified in PRIIA. ***Response:*** PRIIA, the statutory basis for these performance measures, directly incorporates Amtrak into their creation by stating that FRA and Amtrak "shall jointly" develop the Metrics and Standards. It establishes no completely independent agency or funding mechanism for gathering and analyz-

ing the relevant data. Thus, the statute affords no scope or basis for action regarding this comment.

Fairness. ***Comment:*** Two railroads expressed misgivings about the fundamental fairness of the performance measures. One railroad indicated that the proposed performance measures were biased towards Amtrak and provided insufficient improvements on existing measures. The other cited what it said were fairness issues with tying performance penalties to Amtrak's schedules, which it argued are sometimes unrealistic. ***Response:*** The FRA and Amtrak aimed to encourage cooperation between Amtrak and the host railroads. For example, Annex 1 contemplates that Amtrak and its individual host railroads may agree that during a specific quarter, a specific train may incur more delay than usual, or may have an adjustment made to its public schedule, due to a major maintenance and construction project. Scheduling remains primarily a topic for collaboration between Amtrak, its host railroads, and any sponsoring States, subject to the indirect constraints of the Effective Speed standard for OTP.

4. Effects of the Metrics and Standards

Administrative burdens. ***Comment:*** Several freight railroads stated that the proposed performance measures present an administrative burden and will require significant operational changes to make current Amtrak schedules realistic. They went on to assert that the Proposed Metrics and Standards will increase the cost of hosting Amtrak trains and noted that those costs may need to be passed on to Amtrak. ***Response:*** Amtrak and its host railroads each have their own train performance databases that often utilize different metrics or different definitions for the same metrics. As train performance

data thus lacks uniformity among railroads, additional resources may be necessary to achieve comparable data. Similarly, the new All-Stations OTP will increase the number of OTP data points that may be subject to dispute between Amtrak and its hosts. Conversely, the heightened attention under PRIIA to performance measures on the part of both Amtrak and host railroads may lead to operational improvements that can result in lower costs and/or higher revenues to Amtrak and increased incentive payments to host railroads, mitigating administrative costs that stem from the Metrics and Standards. The FRA encourages Amtrak and host railroads to align metrics within their respective databases where possible and encourages Amtrak to continue with efforts to enhance train delay data through automation.

Effects on Amtrak/host relationships. ***Comment:*** Norfolk Southern Corp. (NS) stated that the proposed performance measures will hinder its working relationship with Amtrak, while the Association of American Railroads (AAR) and CSX Transportation, Inc. (CSX) said the Proposed Metrics and Standards may dissuade freight host railroads from agreeing to new Amtrak services. ***Response:*** The Metrics and Standards are not intended to deter future Amtrak service; rather they are to lead to improvements in whatever Amtrak service is offered. Based on the collaborative approach described in Annex 2, and on the freight railroads' long record of passenger operations, the FRA and Amtrak expect that all stakeholders will work closely together to implement this Congressional mandate efficiently and effectively, and in so doing minimize the burdens and maximize the benefits felt by each other.

5. Relationship to State Agency/Amtrak Contracts and Standards

Development of Metrics and Standards for State-supported services. ***Comment.*** Washington State Department of Transportation (WSDOT) made the case that States with State-supported services and Amtrak should be responsible for developing the Proposed Metrics and Standards in a process supported by a Federal appeals forum. ***Response:*** States have a role in the process of defining the Metrics and Standards as well as a vital interest in the end product of this process. However, Section 207 of PRIIA mandates that Amtrak and the FRA act as the lead parties in developing these performance measures.

Effect of Metrics and Standards on contracts between the States and Amtrak. ***Comment:*** A number of State agencies expressed concern regarding the effect the Proposed Metrics and Standards might have on their intercity passenger rail agreements. In particular, several agencies stated that the Proposed Metrics and Standards should not replace State operating and performance contracts with Amtrak and other railroads. State agencies argued for the continued right to negotiate their own standards for State-supported services with rail carriers and to perform and use their own performance analyses. ***Comment:*** These Final Metrics and Standards are not intended to (a) alter or replace operating and performance agreements between States and Amtrak; (b) hinder States or Amtrak from negotiating standards with each other, or from incorporating an appeals process into their agreements; or (c) limit the analytical tools employed by States or other stakeholders.

6. Relationship to agreements between Amtrak and host railroads.

Comment: Metro-North sought confirmation that the Metrics and Standards will not supersede any Amtrak-host railroad OTP agreements. ***Response:*** Section 207 of PRIIA states that, "to the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards . . . into their access and service agreements."

7. Metrics and Standards, PRIIA, and ARRA

Comment: State agencies were also concerned with the possible interrelationships between the Proposed Metrics and Standards and both the American Recovery and Reinvestment Act of 2009 (ARRA) and other PRIIA-defined initiatives. Caltrans, in particular, requested clarification as to whether grant proposals under the FRA's High-Speed Intercity Passenger Rail (HSIPR) program will be evaluated based on a project's ability to improve performance measures or on a route's previous ability to meet performance standards. Also, assurance was sought that projects requesting Federal funding will only be evaluated against applicable performance measures. The Capital Corridor Joint Powers Authority (CCJPA) indicated that high performing routes will be at a disadvantage when being considered for HSIPR funding. CCJPA also noted that non-Federal capital funding sources and traffic volume are not discussed as evaluation criteria.

Response: In response to these comments about the relationship of the Metrics and Standards to other PRIIA provisions and the HSIPR program, it is worth noting that:

1) The HSIPR program involves a merit-based evaluation process as described in Section 5 of the Interim Program Guidance, available at http://www.fra.dot.gov/us/content/2243.

2) In the absence of agreed Metrics and Standards at the time the Interim Program Guidance was published, the review criteria in Section 5 of the Guidance adopted generalized topics reflecting the underlying purposes of PRIIA Section 207—for example, "increased on-time performance."

3) The application and review process for the first round of HSIPR funding (pursuant to the Interim Program Guidance published in the Federal Register on June 23, 2009) reached its conclusion on January 28, 2010, with the announcement of the first recipients selected to receive grant funding. As these Final Metrics and Standards had not been published at that time, they could not be applied to the first HSIPR funding competition.

4) The applicability of these Final Metrics and Standards to the application, review, and/or selection processes in future solicitations under the HSIPR program would be clarified in the HSIPR notices announcing such solicitations.

5) The above points do not preclude the FRA from incorporating, at its discretion, these Final Metrics and Standards in grant award negotiations with any entities selected to receive HSIPR grants.

B. Comments on Financial and Operating Measures

1. Summary of the Proposal and of the Final Metrics and Standards.

The Proposed Metrics and Standards included five different metrics under the Financial/Operating category: (1) Percent of Short-Term Avoidable Operating Cost Covered by Passenger-Related Revenue (excluding capital charges); (2) Percent of Fully Allocated Operating Cost Covered by Passenger-Related Revenue (excluding capital charges); (3) Long-term Avoidable Operating Loss per Passenger Mile (excluding capital charges); (4) Passenger-Miles per Train-Mile; and (5) Adjusted (Loss)[3] per passenger-mile. The first four of these were to be reported at the route level and the last, at the system level. For all five, the proposed standard was to be continuous year-over-year improvement.

In these Final Metrics and Standards, the same measures are retained; all financial measures will be calculated both with and without State subsidies included in revenue. Continuous year-over-year improvement will be reported and assessed on a moving two-year (eight-quarter) average basis.

2. Comments and Responses

a. Additional Measures Needed

Comment: The Midwest High-Speed Rail Association (MHSRA) recommended incorporating measures on load factor and passenger and ticket revenue by origin-destination. It also proposed adding a metric and stan-

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[3] The definition of Adjusted (Loss) is: Net Operating Loss (before net interest expense), less Depreciation, Other Post-Employment Benefits (OPEB's) and project costs covered by capital funding.

dard for passengers declined rail service due to lack of available space. ***Response:*** The metrics proposed by MHSRA are potentially useful for a number of purposes. However, they are very detailed, involve origin-destination data that is typically proprietary to common carriers, and (in the case of passengers denied rail service) involve steep challenges of measurement, including the elimination of duplicate inquiries by a single passenger for the same space. For all these reasons, these measures would exceed the scope and purpose of Section 207 of PRIIA and add significant complexities to the quarterly report. Therefore, these new measures are not included in the final Metrics and Standards.

b. Calculations of Financial Measures

The Docket received a number of comments regarding the process for calculating the various financial measures.

Treatment of State operating subsidies. ***Comment:*** A number of State agencies called for calculating the route-by-route financial measures both with and without State contributions included in revenue, in order to better illustrate Amtrak's operating losses before receiving State funds. ***Response:*** Numerous Amtrak routes are supported by State contributions, which—while indispensable to support continuing operations—tend to obscure an analysis of the inherent efficiency of the routes in question. It would be useful, feasible, and not unduly burdensome to report cost recovery and operating loss per passenger-mile calculations both with and without State contributions, and the Metrics and Standards now incorporate this change.

Treatment of fully-allocated costs. ***Comment:*** CCJPA questioned the fairness of the proposed fully allocated cost calculation, in particular, the fact that while overhead is allocated to State-supported services, revenues from Amtrak's ancillary businesses are not allocated in a similar manner. ***Response:*** A certain amount of Amtrak's overhead is related to each of Amtrak's routes and ancillary business. Amtrak's new fully allocated cost methodology allocates system-wide costs, such as General and Administrative and other overhead costs, to all of Amtrak's routes and businesses in a logical and equitable manner. CCJPA is correct that the fully allocated cost methodology does not simply spread revenues earned from Amtrak's operations among all routes, but assigns them to the routes and ancillary businesses with which they are associated. Attributing both costs and revenues to the routes and ancillary businesses to which they are related allows Amtrak to assess the performance of each individual route or business. Additional detail on Amtrak's fully allocated cost methodology is provided in the FRA's and Volpe Center's report entitled *Methodology for Determining the Avoidable and Fully Allocated Costs of Amtrak Routes*, available at http://www.fra.dot.gov/Pages/1996.shtml under "Intercity Passenger Rail Cost Analysis."

Accuracy of Amtrak's route accounting. ***Comment:*** The Wisconsin Department of Transportation (WisDOT) expressed concerns with the accuracy of Amtrak's new cost accounting system after experiencing perceived accuracy issues under the previous system. ***Response:*** Amtrak is in the process of implementing a new cost accounting system, called Amtrak Performance Tracking (APT), which will be used to calculate Short-Term Avoidable Operating Costs, Long-Term Avoidable Operating

Costs, and Fully Allocated Costs for each route on a monthly basis. APT was designed to enhance transparency and also to assign costs more fairly, accurately, and consistently. All topics related to APT are addressed in great detail in the *Methodology* report referred to above.

Effects of service changes on fully-allocated costs. ***Comment:*** CCJPA also stated that fully allocated costs will need to be recalculated if a State discontinues a service. ***Response:*** That statement is accurate, but presents no challenges since Amtrak's new system will calculate the fully allocated costs of each Amtrak route monthly.

Equipment ownership. ***Comment:*** CCJPA requested that the Short-Term Avoidable Operating Cost calculation be defined in such a way that it can determine the effects of owning rail equipment. ***Response:*** Again, the FRA's and Volpe Center's forthcoming report provides a detailed explanation on how Fully-Allocated and Avoidable Operating Costs are estimated in Amtrak's new accounting system.

c. Continuous Improvement Measure

Comment: Both NS and Caltrans disagreed with the continuous year-over-year improvement standard proposed for certain metrics. Caltrans observed that such a standard serves to penalize high performing routes, and that—with regard to the financial measures—certain expenses, like fuel, cannot be controlled. ***Response:*** The FRA and Amtrak considered these comments in revising the Metrics and Standards. Continuous improvement standards will be based on an eight-quarter rolling average instead of a single quarter in order to smooth out the effects of transitory events. The Final Metrics and Standards also will apply an inflation adjustment to the

dollar-denominated data from prior years used in multi-year rolling averages, to make them comparable with current-year data. With regard to high performing routes, as mentioned above, such routes will derive direct benefits from their high performance, independent of these performance measures.

d. Financial Measures Unsuitable for State Needs

Comment: One stakeholder, CCJPA, argued that the financial performance measures did not meet the needs of the States. CCJPA stated that the proposed metrics are not flexible enough to pertain to their contracts with California, Amtrak, and other railroads (e.g., CCJPA's fixed price annual contract with Amtrak). For that reason, it maintained that the proposed financial standards should not supersede existing agreed-upon methods for calculating and reporting train performance at the State level. ***Response:*** As stated above under "Effect on State Agency Contracts and Standards," the Metrics and Standards are not intended to circumscribe the flexibility of the States and Amtrak to arrive at mutually satisfactory agreements.

e. Mail Revenue

Comment: The National Association of Railroad Passengers (NARP) noted that although mail revenue is a component of a route's total revenue calculation, Amtrak discontinued its mail transporting services in 2004. NARP recommended that Amtrak reexamine carrying mail on its trains to improve its financial performance. ***Response:*** NARP's comment relates to business decisions of and between Amtrak and the U.S. Postal Service

and does not affect the definition or implementation of the Metrics and Standards.

C. Measures of On-Time Performance (OTP) and Train Delays

1. Summary of the Proposal and of the Final Metrics and Standards

The Proposed Metrics and Standards dealt separately with OTP and train delays. A route's OTP was to be discerned on the basis of three tests (only two tests until FY 2010): 1) Change in Effective Speed,[4] 2) percent on time at the endpoint (Endpoint OTP), and 3) percent on time at all stations served (All-Stations OTP). For all routes, effective speed was to be no worse than in the baseline year, FY 2007. The Proposed Metrics and Standards implied that the effective speed for each quarter was to match or better that for all of FY 2007.

OTP under the final standard is to be discerned on the basis of three tests (only two tests until FY 2012): 1) Change in Effective Speed, 2) percent on time at the endpoint (Endpoint OTP), and 3) percent on time at all stations served (All-Stations OTP) (Effective as of FY 2012). The final standard makes clear that the effective speed is to be calculated on a rolling four-quarter basis and compared with a fixed FY 2008 baseline.

The standard for percent on time was to vary by route type and by year, as follows:

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[4] Effective speed is defined as a train's mileage, divided by the sum of (a) the scheduled end-to-end running time plus (b) the average endpoint terminal lateness.

Route Type	Percent on time in first year	Percent on time in fifth year
Acela	90%	95%
Other Northeast Corridor (NEC) routes	85%	90%
All other corridors	80%	90%
Long-distance routes	80%	85%

The same OTP standards are to be applied to both Endpoint and All-Stations OTP, although the tolerances for determining whether a train was late would differ between the two metrics. The OTP percentages above have been retained intact in the Final Metrics and Standards.

The following table compares the original proposal for Train Delays with that contained in the final document:

Metric (Minutes per 10,000 Train-Miles)	Original Proposal	Final Metrics and Standards
Off Northeast Corridor		
Amtrak-responsible delays	250	325
Host-responsible delays	700	900
Cause of delay shown for information?	Yes	Yes

Metric (Minutes per 10,000 Train-Miles)	Original Proposal		Final Metrics and Standards	
On Northeast Corridor				
	Acela	All other services	Acela	All other services
Total train delays	—	—	265	475
Infrastructure delays	104	123	—	—
Passenger and Commuter Train Interference	67	116	—	—
Third-party delays	37	44	—	—
All other delays	76	187	—	—
Cause of delay shown for information?	No		Yes	

As indicated in the table, the delay allowances have been raised and (in the case of the NEC) simplified from those originally proposed. For both off- and on-NEC performance, further information on causes of delay will be provided in the quarterly reports (although not part of the standards). Annex 3 provides the rationale for the chosen allowances.

In an important change from the original proposal, Annex 1 provides a mechanism for collaboration between Amtrak and its host railroads in adjusting published timetables and delay allowances under certain circumstances involving major planned construction and maintenance efforts.

2. Comments and Responses

The largest number of comments on the Proposed Metrics and Standards concerned the measures for on-time performance and train delays.

a. General Comments on OTP

Which routes are covered? ***Comment:*** CCJPA inquired which Amtrak routes would be subject to the Proposed Metrics and Standards and asserted that corridor services are more sensitive to OTP than long-distance trains. ***Response:*** PRIIA draws no distinction among the types of routes to be evaluated; thus all intercity passenger rail routes are covered by the Metrics and Standards, irrespective of the source(s) and methods by which they are funded, their relative sensitivity to the metrics, or the order in which they were established as part of the Amtrak system.

State-supported routes. ***Comment:*** WSDOT recommended adding "State-Supported Routes" to the list of Amtrak service types in the report to explicitly highlight the fact that they are covered by the Metrics and Standards. ***Response:*** Isolating State-supported routes as a service type for these Metrics and Standards would produce insufficient benefits to justify the added complexity. For example, some corridor routes have both State-supported and non-State-supported trains; and annual changes in Amtrak-State contracts could produce an ever-shifting set of State-supported routes, thus detracting from year-to-year comparability. Finally, the number of non-State supported corridors is very low, and has shown signs of diminishing over the long term, thus limiting the utility of isolating these few corridors as a separate service type.

"Host railroad." ***Comment:*** Metro-North asked for clarification of the definition of a host railroad. ***Response:*** Host railroads are all entities that own and/or operate the track over which Amtrak operates. Host railroads include not only freight railroads, but also all commuter railroads and State or regional agencies that own track used in intercity passenger service. Amtrak itself serves as a host railroad when operating over its own infrastructure. Train delays will be identified by route by host railroad for each host railroad that Amtrak utilizes for an appreciable distance (15 miles or more).

Effects of the OTP standards. ***Comment:*** A few parties submitting comments expressed concern about the potential effect (or lack of effect) of the OTP standards. BNSF argued that the Proposed Metrics and Standards will not substantially improve Amtrak OTP. The Maryland Transit Administration and the Southern California Regional Rail Authority (SCRRA) both were concerned that Amtrak OTP improvements might negatively impact commuter railroads and commented that such OTP improvements should not come at the expense of commuter rail operations. ***Response:*** PRIIA Section 207 is a promising sign of increasing national attention to the reliability of Amtrak's service, and the OTP provisions of the Metrics and Standards constitute complementary performance indicators addressing the multiple facets of reliable service. Consequently, there is every reason to expect further improvements in Amtrak's OTP—especially when viewed against the backdrop of the progress in OTP that occurred in FY 2009 over FY 2008, as well as the ongoing Federal commitment to intercity passenger rail investments evidenced in the HSIPR program. The Metrics and Standards are not intended to disturb existing mechanisms that safeguard the integrity of commut-

er rail operations, such as agreements among commuter authorities, commuter rail operators, and railroads hosting commuter service.

Suitability of Amtrak schedules. ***Comment:*** Several freight host railroads indicated that Amtrak's current schedules are not suitable for and, in fact, cannot support reliable OTP. To meet the performance standards, these respondents asserted, the schedules will need to be revised using computer modeling techniques that account for current traffic and seasonal patterns. For instance, BNSF stated that Amtrak's current schedules are based on pure run time, not on Amtrak's ability to meet on-time arrival standards; and that longer-distance trains need to build additional recovery time into their schedules since they encounter a greater number of random delays. ***Response:*** The setting of schedules is primarily a matter between Amtrak, its host railroads, and any sponsoring States; scheduled train timings fall within the scope of the Metrics and Standards only to the extent that they contribute, in combination with endpoint terminal delays, to an increase in effective speed over the baseline. While modern scientific techniques (e.g., train performance calculators, simulations of route performance given fixed passenger schedules and random arrivals of freight trains) are desirable and encouraged, —as they can assist the two parties and other stakeholders in developing reasonable and workable schedules,—there is no substitute for teamwork and goodwill among the parties. Indeed, Annex 2 addresses that very topic, by encouraging the stakeholders to work through these issues in a collaborative manner. That the freight railroad industry devoted significant attention to its docket responses on the Metrics and Standards indicates that the industry

understands their importance and desires to collaborate in their successful implementation.

OTP and infrastructure improvements. ***Comment:*** Freight railroad and State agency respondents wondered whether and how the Proposed Metrics and Standards will deal with the need for ongoing and future rail infrastructure improvements. Freight railroads argued that significant infrastructure improvements will be needed (with Federal funding) to achieve reliable OTP results given current Amtrak schedules. One freight railroad, CSX, specifically tied the Effective Speed measure back to the issue of necessary rail capital investments. ***Response:*** These Metrics and Standard will yield increasingly robust OTP and delay reports that will provide a valuable data resource to Amtrak, States, and host railroads in pinpointing the routes that are most in need of improvement, and in isolating the causes of the most serious delays on each route. In that way, the Metrics and Standards will assist all parties in identifying the most effective and efficient ways to improve intercity passenger rail service. In turn, that knowledge will help to provide a basis for investments by, and partnerships among, the various stakeholders, and will assist them in prioritizing capital funds from available sources.

Adjustments for major construction and maintenance. ***Comment:*** Several State agencies recommended incorporating a mechanism into the OTP standards to adjust for periods when track work is being performed. For example, WSDOT recommended dismissing performance penalties that stem from delays occasioned by track work. ***Response:*** Annex 1 to the Metrics and Standards provides guidelines under which stakeholders can work together to temporarily adjust delay allowances and pub-

lic Amtrak schedules during planned periods of major maintenance and construction.

Automation. ***Comment:*** Several stakeholders were concerned about the data collection process for OTP data and stated that more automated and technically advanced data collection mechanisms are needed in order to reliably track OTP. They also noted that such mechanisms would take time to implement. ***Response:*** The FRA agrees that more automated data collection mechanisms could be beneficial to the OTP reporting process and acknowledges that such improvements will take time for development, testing, and deployment. Amtrak has stated that it will investigate the possibility of integrating OTP data gathering capabilities with new technologies that it may be implementing (e.g. GPS tracking systems); in that regard, Annex 2 mentions "potential automation of station arrival and departure time recording."

Data availability. ***Comment:*** One commenter stated that data collection methods need to be developed for the Effective Speed and All-Stations OTP measures. ***Response:*** Amtrak has assured the FRA that it is currently capable of providing data for both Effective Speed and All-Stations OTP. Furthermore, the FRA has been successfully making use of Amtrak data to calculate effective speed in seven quarterly OTP reports to Congress (available at http://www.fra.dot.gov/us/content/ 1996),

b. Comments on Effective Speed Measure

Several concerns emerged regarding the proposed Effective Speed measure.

Rationale for an "effective speed" test. ***Comment:*** Several freight host railroads argued that the Effective Speed measure has limited applicability to OTP. BNSF

argued that the baseline set for the standard was never agreed upon and the AAR stated that the associated schedules are unrealistic. For this reason, it expressed its opposition to using the measure to guard against lengthened schedules. AAR claimed that train speed is not a consideration for passengers choosing to travel by train, while CSX maintained that the Effective Speed metric was superfluous since passengers are most concerned with on-time arrivals. Caltrans stated that the metric cannot be used to assess the possible speed of a route.

Response: The FRA and Amtrak strongly believe that the preservation of the "effective speed" test fulfills a number of purposes simultaneously:

- It serves as a bulwark against the "schedule creep" that has seen actual travel times experienced by passengers on many—but not all—American passenger rail routes worsen significantly over the past half-century.[5]
- Similarly, by underlining the importance of shortening (or at least preventing deterioration in) door-to-door travel times, it emphasizes the key role of the rail mode in serving the public convenience and necessity and accords in principle with the high-speed emphasis of the Administration as described in its Strategic Plan for high-speed rail.[6] To solve OTP challenges simply by lengthening

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[5] Some of these variations reflect changes in routes and in stopping patterns, often caused by the reduction in service from many trains to one train daily in each direction on most long-distance routes.

[6] The Strategic Plan is available at http://www.fra.dot.gov/us/content/31.

schedules does not comport with prevailing Federal policy toward intercity passenger rail.

- Finally, as is the case with all-stations OTP, it emphasizes that the expeditious and reliable transportation of all intercity rail passengers on all routes—regardless of the region, the population density, and the type of rail service—is an important goal of both the FRA and Amtrak. In particular, in view of the thousands of city-pair markets and diverse travel purposes served by long-distance trains, the FRA and Amtrak cannot agree with some respondents that OTP is more important on some types of routes than on others; nor can it accept that door-to-door travel times are irrelevant to rail passengers.

Baseline. ***Comment:*** Multiple stakeholders stated that the proposed baseline for the Effective Speed measure is not adequate and/or reasonable. The Virginia Department of Transportation (VDOT) stated that the baseline should be derived from comprehensive route and consist analyses. ***Response:*** The FY 2007 baseline was historically and logically based, as FY 2007 was the fiscal year immediately preceding the enactment of the Consolidated Appropriations Act, 2008 (Public Law 110-161, December 2007); it was this Act that first expressed the Congressional mandate for the Secretary of Transportation to establish OTP standards for Amtrak routes, and to publish a quarterly report on each route's OTP. The FRA and Amtrak believe, however, that the PRIIA (enacted October 16, 2008) represents a more enduring manifestation of Congressional intent, as it is a multi-year authorization rather than an appropriation. Accordingly, the baseline year for Effective Speed has been changed to

FY 2008, the last full Fiscal Year prior to the enactment of PRIIA Section 207. While subject to certain refinements in calculation methods,[7] the FY 2008 baseline must be regarded as representing most closely the prevailing Congressional intent as expressed in the PRIIA.

Seasonality. ***Comment:*** AAR and several freight host railroads stated that the baseline does not account for seasonal differences in rail operations or for the expected increase in freight-rail demand. BNSF, in particular, commented that late Amtrak trains during periods of heavy freight traffic are the result of congestion and that Amtrak should respond to such congestion in the same manner as the freight railroads do by increasing its run times during such periods. BNSF and AAR recommended that the effective speed baseline be adjusted seasonally to account for seasonal variations in rail operations.

Response: The baseline covers an entire fiscal year, thereby accounting for a full four-season spectrum of traffic and climate conditions. The FRA agrees that the result for a single quarter could potentially reflect a seasonal skew, and has therefore adjusted the Metrics and Standards to use a four-quarter rolling average instead. However, to directly adjust the effective speed (or any other OTP) standard on a seasonal basis would be undesirable in that it would contradict one of the basic tenets and inherent advantages of passenger rail transporta-

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[7] For the reports to Congress, the FRA calculated the baseline indirectly, adding (for each route) the scheduled trip time to the average minutes late over the course of FY 2007. Amtrak has more direct methods of calculating effective speed from its operating data, which will be implemented for purposes of the quarterly Metrics and Standards reports.

tion—consistency of schedules and performance in all seasons.

Connection between effective speed and delays. ***Comment:*** NS stated that Effective Speed has no direct relation to delays or to the causes of delays. ***Response:*** Effective Speed is indeed related to delays since it incorporates the average lateness of trains, which results from the delays that trains encounter.

Deletion of effective speed measure. ***Comment:*** One respondent recommended simply eliminating Effective Speed and proposed substituting in its place the average running speed of individual trains. ***Response:*** The FRA and Amtrak perceive no reason to substitute, for effective speed, a measure that does not incorporate the effects of both OTP and scheduled train timings.

c. Comments on Endpoint OTP Measure

Despite a number of issues raised by respondents and discussed below, the FRA and Amtrak maintain that the Endpoint OTP measures are useful. For example, Performance Improvement Programs resulting from OTP scores that fall below the standard will act as catalysts for identifying operational improvements and near-term infrastructure projects in which to invest.

Schedules and recovery time. ***Comment:*** VDOT recommended utilizing the FRA's methodology for calculating recovery time when adjusting schedules. ***Response:*** As mentioned above under "Suitability of Amtrak schedules," schedule-setting *per se* remains primarily the responsibility of Amtrak, the host railroads, and a route's sponsoring State (if any). The FRA's recovery time calculation, included in the guidance manual "Railroad Corridor Transportation Plans" (http://www.fra.dot.gov/us/

content/1415), is one tool that can be used to help assess the need for adjusted schedules. However, the FRA and Amtrak realize that the model's applicability varies among actual operating environments, which may necessitate significant adjustments to the calculations.

Endpoint OTP Tolerances. ***Comment:*** Related to the issue of schedule is that of OTP tolerances. CSX and the AAR commented that on-time arrival tolerances associated with the long-distance trains are insufficient for their route length. As described in the Proposed Metrics and Standards, a train is considered "late" if it arrives at its endpoint terminal more than 10 minutes after its scheduled arrival time for trips up to 250 miles; 15 minutes for trips 251-350 miles; 20 minutes for trips 351-450 miles; 25 minutes for trips 451-550 miles; and 30 minutes for trips of 551 or more miles; except that all Acela trips are considered late if they arrive at their endpoint terminal more than 10 minutes after their scheduled arrival time. ***Response:*** Long-distance trains already have more recovery time built into their schedules than corridor-type services,[8] which compensates for on-time arrival tolerances being capped at 551 or more miles. Thus, we are not persuaded of the need to change the tolerances.

Endpoint OTP and freight traffic levels. ***Comment:*** The AAR also stated that, historically, Amtrak OTP levels above 80 percent have occurred during periods of decreased demand for freight rail. ***Response:*** By defini-

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[8] For example, trains in the San Joaquin corridor between Bakersfield and Oakland, CA (316 miles) have approximately 40 minutes of recovery time and other adjustments incorporated into their schedules. The Auto Train between Sanford, FL and Lorton, VA (855 miles) has approximately 2 hours, 45 minutes of recovery time and other adjustments.

tion, to be "reliable," the quality of passenger rail service should be consistent over time, from season to season and year to year, regardless of the demand levels for freight and commuter service. If, in future periods of freight traffic growth, the application of these Metrics and Standards reveals negative trends, Section 207 will have served an important purpose: the identification of routes needing improvement to restore operating consistency. Once that identification is made, focused studies and Performance Improvement Programs can reveal specific remedies and assist stakeholders in setting priorities and seeking funding.

Limitations and proposed changes to Endpoint OTP. ***Comment:*** Some respondents pointed to limitations of, and possible changes to, the Endpoint OTP metric. CSX, for example, observed that Endpoint OTP does not reveal Amtrak's performance on individual host railroads or the causes of substandard OTP. As such, CSX requested that Endpoint OTP be deemed an insufficient trigger for STB investigations.

Response: Section 213 of PRIIA mandates that percent on-time standards be used by the STB as a basis for initiating investigations on Amtrak's service: "If [among other possible reasons] the on-time performance [i.e., Endpoint OTP] averages less than 80-percent for two calendar quarters," the STB's investigative discretion or mandate takes effect. Each of the OTP metrics, by itself, reveals only one aspect of service reliability. Train delay data by cause and by host railroad has been incorporated into the Metrics and Standards to complement the Endpoint OTP figures, which only illustrate the frequency of lateness.

Endpoint OTP and host railroad performance. ***Comment:*** AAR recommended reporting Endpoint OTP by host railroad while CSX and NS recommended using host railroads' contract performance with Amtrak instead. ***Response:*** As noted above, individual host railroad performance will be illustrated through the train delay metrics. Thus, the FRA does not believe that it is necessary to also report Endpoint OTP by host railroad. (Nor would it be consistently meaningful: many routes make use of more than one host, and Endpoint OTP says nothing about responsibilities for late delivery of trains at intermediate junctions between hosts.) In response to the comments by CSX and NS, the standards embedded in host railroad contracts are not suitable as general performance measures for the purposes of this effort as contracts differ among the host railroads, significantly limiting their comparability. Furthermore, as mentioned above, Congress directed Amtrak and the host railroads to adopt these Metrics and Standards in their access and service agreements—not the reverse.

Proposal for site-specific standard-setting. ***Comment:*** Caltrans stated that the performance standards should be based on current track conditions and track improvements that will realistically occur by 2013. ***Response:*** Although useful, this concept raises practical difficulties in that (a) implementation of these Metrics and Standards must precede project selection decisions in the HSIPR program, thus making track conditions impossible to predict; (b) the concept implies separate standards for each route, a source of undesirable complexity; and (c) for intercity passenger rail to attract the kind of demand that will allow it to reach its full potential to yield public benefits, the standards for 2014—while achievable—must also be customer-centric and competitive with

other modes, rather than constrained by current conditions.

d. Comments on All-Stations OTP Measure

Numerous parties expressed misgivings about the All-Stations OTP measure and its potential impact on operations. The FRA and Amtrak, however, firmly believe that the benefits of this measure will more than counterbalance its potential drawbacks. Furthermore, as a matter of principle, the nature of passenger rail service mandates All-Stations OTP: a single train, unlike an airline flight, can serve hundreds of origin/destination pairs, the passengers on each of which deserve a consistently high quality of service that can only be obtained if trains are on time throughout their runs.

Potential drawbacks. ***Comment:*** The CCJPA, AAR, and several freight host railroads stated that analysis of All-Stations OTP data would be an excessive administrative and financial burden, which the AAR claimed would be unjustified given the light passenger traffic at intermediate stations. VDOT implied that All-Stations OTP might actually have the effect of harming Amtrak's End-point OTP. Caltrans stated that spreading out recovery time for the All-Stations OTP metric will require thorough analysis and consideration of current operating practices. BNSF commented that Amtrak trains holding at intermediate stations because of reallocated recovery time will create additional delays down their rail line.

Response: FRA analysis shows that passengers utilizing intermediate stations amount to a significant portion of Amtrak's ridership—indeed, on many routes, a majority of the riders. Moreover, FRA and Amtrak believe that every intercity rail passenger deserves a consistently

high quality of service under the OTP and other metrics and standards. Thus, both principle and travel demand patterns call for the measurement of OTP at intermediate points, despite the potential burden and operational impacts of this standard as identified by the respondents.

Scheduling implications. ***Comment:*** Both State agencies and freight host railroads acknowledged that the All-Stations OTP metric will require Amtrak and host railroads to agree to schedule adjustments to reallocate recovery time among intermediate stations.

Response: The FRA and Amtrak fully realize that introduction of the All-Stations OTP standard will involve a challenging process of readjustment, in which Amtrak, its railroad hosts, and (where applicable) State sponsors of service will collaboratively analyze and, as needed, modify train schedules. The FRA encourages these parties to develop a strategy and plan to address this challenge as soon as possible. To allow for an orderly transition to All-Stations OTP, the FRA and Amtrak have adjusted the implementation schedule: the All-Stations standard will not go into effect until FY 2012, two years after the other standards, to provide additional time for needed operational and scheduling adjustments. (All-Stations OTP data will, however, be published for information only, beginning with the first quarterly Metrics and Standards report.)

Effects of planned construction and maintenance. ***Comment:*** NS stated that freight host railroads have inadequate input into the schedule setting process, and that—even with revised schedules—All-Stations OTP will unfairly penalize host railroads when conducting planned track work and receiving late Amtrak trains in the midst of such work. ***Response:*** Annex 1 provides a

means of revising public schedules (hence the operation of All-Stations OTP) during periods of major construction and maintenance as agreed upon by Amtrak, the freight railroad host, and (as appropriate) the State sponsor of service.

Alternative approaches. ***Comment:*** Several parties proposed alternatives to the All-Stations OTP or alternative methods for calculating All-Stations OTP. CSX and multiple State agencies recommended simplifying the All-Stations OTP metric by calculating OTP only at strategic intermediate points. Caltrans, on the other hand, recommended maintaining this metric but calculating it based on the average minutes of early or late arrivals at each station. The CCJPA recommended eliminating the All-Stations OTP measure on shorter routes, while NS recommended eliminating the measure completely. ***Response:*** The Final Metrics and Standards retain "All-Station OTP" as originally proposed. Reducing the number of stations covered raises serious questions about how the list of stations is to be pruned, and implies that some passengers' and some cities' quality of train service is more important than that of others. As Amtrak has assured the FRA that the production of All-Stations OTP data is eminently feasible, there is no reason to implement changes to it on the grounds of data availability.

Other issues. ***Comment:*** Caltrans asserted that the All-Stations OTP standards are unrealistically high and, further, that results for this metric will necessarily be lower than for Endpoint OTP. ***Response:*** FRA's own analysis suggests that, at least for some routes, All-Stations OTP could be comparable to or even higher than Endpoint OTP. It should also be noted that the calculation of All-Stations OTP uses a 15 minute grace period,

which allows for that level of delays while still recording on-time operation. Even if All-Stations OTP temporarily yields less favorable results than those of Endpoint OTP, the heightened attention to intermediate stations will have long-term benefits both for rail passengers and for Amtrak's traffic volumes and revenues. ***Comment:*** Caltrans also requested confirmation that State agencies will not be responsible for collecting and analyzing the All-Stations OTP data. ***Response:*** Amtrak—and not State agencies or other parties—will be responsible for collecting All-Stations OTP data, which will be analyzed by both Amtrak and FRA personnel.

d. Comments on Train Delay Measures

Which delays to report? ***Comment:*** The AAR and CSX stated that measuring delays for trains that are on-time is an excessive burden and irrelevant to passengers (i.e., this performance measure should only be used to report delays for late trains). ***Response:*** Reporting delays only for late trains limits the insight and comparability of the train delay data. Reporting all delays experienced by all trains better aligns the metric with the OTP standards, which utilize all train operations in their calculations (as opposed to only late train operations), and it gives an average amount of delays experienced during the operations of each route. A train that is meeting its OTP standard may still experience some high levels of delay along its route, a situation that might ultimately lead to revision of the train's schedule to remove excessive recovery time. Reporting all train delays gives Amtrak, host railroads, and FRA an opportunity to analyze comprehensively a route's performance and to develop plans to mitigate any challenges that are revealed, thereby

further improving the route's OTP.[9] As a result, train delays has been retained as a key element in the Final Metrics and Standards.

Pure vs. scheduled run time. ***Comment:*** Multiple stakeholders objected to the use of pure run time as the basis for train delay data outside of the NEC.[10] CSX argued that freight railroads are held to a higher performance standard than Amtrak, which measures itself on scheduled run time within the NEC. Several freight railroads argued that use of pure run time does not align with the public's service expectations, which are based on schedules. WSDOT stated that pure run time does not account for planned capital improvement projects, while Caltrans commented that use of pure run time oversimplifies train operations on congested corridors. BNSF stated that OTP measures are only relevant if they are compared to Amtrak's public timetable. Both State agencies and freight railroads recommended basing this

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[9] Beyond these objective benefits of tracking all delays, it is not necessarily true that train delays are irrelevant to individual passengers: For some passengers at least, anecdotal evidence suggests that sitting on a stopped train in the middle of a cornfield is not only frustrating but also cause for anxiety, as it implies that the train might be late at the passenger's destination. Passengers cannot be expected to know the intricacies of train scheduling, dispatching, and recovery time.

[10] In simplified terms, "pure" run time means that between any two points (say, A and B), Amtrak and the freight railroad will have agreed on how long it should take an Amtrak train to make the run in the absence of any delaying factors. This "pure" run time, plus an allowance ("recovery time" or "pad") for delays, yields the scheduled running time between A and B. Outside the NEC, all delays that cause a train to exceed its "pure" run time are registered as delays, even if the train makes the run between A and B within the scheduled running time.

metric on scheduled run time. ***Response:*** Again, reporting all train delays gives Amtrak, host railroads, and FRA a better opportunity to identify areas of frequent delays on routes, to further improve route reliability. On the NEC, which at this time is a unique high-speed intercity passenger rail operation, the levels of allowable train delays have been significantly lowered to account for Amtrak's use of scheduled run-time. (Total delay allowances off the NEC amount to 1,225 minutes per 10,000 train-miles; on the NEC, there is a total allowance of only 260 minutes for Acela and 470 minutes for all other services.)

Adjustments for out-of-slot trains and track work. ***Comment:*** Metro-North and Caltrans, respectively, argued that train delay data should be adjusted for out-of-slot trains and for planned track work. ***Response:*** The standard for train delays off the NEC has been increased to 900 minutes per 10,000 train-miles (from the original 700 minutes) in the final Metrics and Standards, which will help host railroads absorb delays they incur as a result of receiving late Amtrak trains. Additionally, delay-minute standards may be temporarily adjusted to account for major track maintenance and construction projects that have been planned by host railroads (see Annex 1 for conditions and other details).

Source of delay data. ***Comment:*** Both State agencies and freight host railroads questioned the source of data on delays. In particular, they criticized the use of Amtrak's conductor delay reports as the primary data source for assessing delays due to concerns with the accuracy of those reports. The AAR and BNSF recommended that the freight railroads' delay data also be considered when analyzing delays. The AAR and CSX

stated that a more automated source of delay data is needed. ***Response:*** While we understand these concerns, the source of delay data for the Metrics and Standards is based on the valuable, consistent, comparable information it provides. While some individual host railroads have stated that they produce their own train delay data, no uniform database for minutes of delay across the Amtrak system exists that can replace Amtrak's conductor delay reports. However, individual host railroads can use their own data, when practicable following reporting of the delay, to help resolve discrepancies with Amtrak and help identify the incidents that may have contributed to delays. The FRA agrees that more automated sources of delay data would be beneficial; as noted above, Amtrak has said it will examine integrating more automated OTP measurement mechanisms into future IT implementation efforts (e.g., GPS tracking).

Source of delay standard. ***Comment:*** Questions arose regarding the regression analysis methodology used to establish the various standards for measuring train delays (as described in the Proposed Metrics and Standards). Both CSX and Caltrans stated that regression analyses and resulting performance standards related to delay data should be implemented on a route-by-route basis instead of collectively to account for different characteristics among Amtrak's routes. ***Response:*** A separate delay standard for each route is not practicable; for example, such a standard would need to be altered each time a route or its schedule is changed. Still, the FRA recognizes that different characteristics exist among Amtrak's routes; to account for such variations, 200 minutes have been added to the off-NEC host-responsible train delay standard of 700 delay-minutes per 10,000 train-miles that was originally proposed. Annex 3 describes

the derivation of the delay allowances used in the Final Metrics and Standards.

Delay categories. ***Comment:*** State agencies and host railroads commented that the off-NEC train delay categories are too broad, making it difficult to identify incidents which may have contributed to delays. Both CSX and Metro-North recommended that proposed groupings of delay categories be broken out to provide more detail. Multiple freight railroads indicated that the proposed categories wrongly suggest that many delays are dispatching-related. BNSF further stated that some delays may actually improve Amtrak's overall trip performance, which is not reflected in the proposed Metrics and Standards format. ***Response:*** The inclusion of a train delay allowance in the Metrics and Standards (rather than a zero-tolerance standard) recognizes that a subset of train delays may arise in the normal course of operations, as part of a good-faith effort by all parties to expedite the passage of passenger trains over a complex railway network, or to improve the infrastructure used in passenger service. In terms of the level of detail that will be provided on the source of train delays, these will be provided as metrics for informational purposes only.

Measurement of delays. ***Comment:*** Metro-North requested an explanation as to whether delay minutes on the NEC will be reported on a per 10,000 train-miles basis. ***Response:*** To clarify, train delays on the NEC will be reported on a per 10,000 train-mile basis, which is the same format used to report delays off the NEC. This text was inadvertently left out of the table in the draft.

Comment: NS argued that Delays per 10,000 Train-Miles is an inappropriate measure since no route operates such a distance. NS also commented that the pro-

posed train delay measure does not indicate the frequency and severity of late trains. Furthermore, it recommended removing the entire performance measure from the Metrics and Standards. ***Response:*** Clearly, even the longest Amtrak routes are significantly shorter than 10,000 miles. However, reporting delays on a uniform per train-mile basis is important since there is no consistent route length in the Amtrak system. Amtrak's regularly scheduled services all operate well over 10,000 train-miles each month. With respect to the proposed deletion of the delay standard, PRIIA Section 207 explicitly requires that the FRA and Amtrak jointly develop "metrics and minimum standards for . . . on-time performance and minutes of delay [emphasis added]." Furthermore, although train delay does not indicate the frequency or the severity of late trains, it can provide a starting point for research into the reasons for poor OTP. This initial indicator may be valuable to Amtrak, the host railroads, and any sponsoring State(s) as they seek to raise service quality levels on specific routes.

d. Additional OTP measures proposed

Several recommendations were submitted proposing additional OTP measures.

OTP for other services. ***Comment:*** Maryland Transit recommended including data on commuter and freight train OTP on reports pertaining to the NEC. ***Response:*** While data on commuter and freight OTP might shed further light on operational issues and challenges on the NEC, such data falls outside the scope of these Metrics and Standards. (Section 207 of PRIIA specifically states that the Metrics and Standards are for measuring the performance of intercity passenger train operations.)

Host railroad metric. ***Comment:*** The AAR proposed including a new host railroad metric that would measure performance on the host railroads' own lines based on factors that they can control. ***Response:*** The AAR did not explain how its proposed host railroad metric would be developed or calculated; therefore, this proposal was not sufficiently elaborated for evaluation as part of the docket review.

Measures of the severity of lateness. ***Comment:*** The AAR and CSX proposed including a performance measure calculated based on increments of late train arrivals, e.g., the percentage of trains arriving within 30, 60, and 90 minutes of schedule, in order to enable investigations to be focused on trains that are relatively more late. ***Response:*** The severity of late train arrivals is a component of the Effective Speed measure, of which the total train run time (scheduled time plus endpoint terminal lateness) makes up the denominator. Accordingly, there is no pressing need in the Metrics and Standards for an analysis of train arrivals by lateness increment. Nevertheless, for specific purposes—for example, the development of performance improvement plans for the worst-performing long-distance routes under Section 210 of PRIIA—such a distribution may prove highly informative and beneficial.

D. Other Service Quality Measures

1. Summary of the Proposal and of the Final Metrics and Standards

In the Other Service Quality area, most metrics and standards are derived from Amtrak's Customer Satisfaction Index (CSI). The topics cover the full range of the passenger experience on and off the train. Of these, most

require a "very satisfied" rating from 80 percent of passengers in 2010, and 90 percent in 2014; the only divergences from this standard is for overall service in 2010 (82 percent). As the measures for the "overall station experience" and the "overall sleeping car experience" are not currently included in the CSI, their implementation continues to be deferred.

Two other metrics, not based on the CSI, fall within this category: Equipment-caused service interruptions per 10,000 train-miles, and the presentation of Amtrak passenger comment data by subject matter and major route grouping. No standards would attach to these items, which would be included in the quarterly Metrics and Standards report for information only.

2. Comments and Responses

a. Additions to the Customer Satisfaction Index (CSI) in the Proposed Metrics and Standards

Comment: NARP expressed support for including CSI metrics for passengers' station and sleeping car experiences. ***Response:*** While sufficient CSI data to create standards for stations and sleeping cars currently do not exist, the FRA will work with Amtrak on incorporating these topics into the CSI and developing metrics and standards for them.

b. Other proposed topics

Comment: An individual of unknown affiliation commented that food service should be available on all trains over one hour in duration, that clean restrooms should be standard on all trains, and that safe boarding/detraining should be standard at all stations. The FRA inferred

that the respondent was recommending these items for inclusion as performance standards.

Response: The suggested metric on food availability is too prescriptive, in view of the wide-array of operational characteristics that exist across Amtrak's routes, to be incorporated into the Metrics and Standards. In addition, the suggested standard for safe boarding/detraining is outside the scope of the PRIIA Section 207 mandate, particularly as safety issues fall under Division A of Public Law 110-432, the Rail Safety Improvement Act of 2008, of which Section 404 mandates a study of methods to improve or correct passenger station platform gaps "to minimize the safety risks associated with such gaps for railroad passengers and employees." Also, clean restrooms are already considered in the Metrics and Standards as an aspect of the "On-Board Cleanliness" measure.

c. Sources of Other Service Quality Standards

Comment: WSDOT asked about the source of the Other Service Quality standards and whether comparable foreign data were used to assist in setting these standards. ***Response:*** While acknowledging the potential insights that data from foreign countries and other modes might provide, the FRA and Amtrak regard the CSI as the most practical and readily available source for metrics and standards in the area of Other Service Quality factors.

d. Objectivity of Data Sources

Comment: The TWU noted that the Other Service Quality measures are largely tied to subjective customer response data that are strongly correlated with OTP. The TWU encouraged the use of more objective and

credible data sources in establishing standards and stated that the Metrics and Standards should not be implemented until the Other Service Quality data sources are strengthened. ***Response:*** FRA and Amtrak acknowledged in the Proposed Metrics and Standards that the CSI has some limitations—for instance, the correlation of responses in all areas with on-time performance. Still, as mentioned above, the FRA and Amtrak believe that the CSI provides a practical foundation for the Other Service Quality standards in compliance with the PRIIA. Moreover, the PRIIA's stringent deadlines did not allow for, nor did the PRIIA authorize or fund, extensive research into methods for setting and reporting on Other Service Quality criteria and standards; nor did the PRIIA provide for any new survey instruments or inspection mechanisms, which would likely have been necessary to implement any research recommendations.

e. Level of Other Service Quality Standards

Comment: Several parties submitted comments regarding the appropriate level at which the Other Service Quality standards should be set. NARP, WSDOT, and Caltrans indicated that the Other Service Quality goals were too high, while WisDOT stated they were too low. WSDOT noted that many stations used by Amtrak are not in fact owned by Amtrak, and that standards prescribing station improvements will be a burden for the (often local) station owners to implement. WSDOT recommended the removal of the metric on On-Board Food Service satisfaction due to the inconsistent nature of responses, while TWU requested more information on the Equipment-Caused Service Interruptions measure to better assess its appropriateness.

Response: The FRA believes that the Other Service Quality standards are appropriate. These standards were based on the historical trends of the CSI data, which demonstrate a pattern of annual improvement. With regard to stations, the proposed metric is Percent of Passengers "Very Satisfied" with the overall station experience. The FRA and Amtrak have not yet proposed a standard for this metric, for which data do not yet exist. However, assessing passenger reactions to the station experience is worthwhile—regardless of the availability of funding for any investments that would improve that experience, and irrespective of the stations' ownership. With regard to on-board food service, despite discrepancies in how respondents rate Amtrak's food service, this metric is valuable as a basic indicator of how well Amtrak's investment in food service aligns with customer needs and expectations. Finally, regarding Equipment-Caused Service Interruptions, this metric is intended to offer some insight into the reliability and soundness of the fleet as experienced by passengers. While details are yet to be fully worked out, the Proposed Metrics and Standards provided a definition of service interruption as well as a brief description of the mechanics to be used in calculating this metric. Also, to reiterate, this metric would be calculated on a route-by-route basis, not for the system as a whole; and no standard is being proposed for this metric.

E. Public Benefits, Including Service Availability and Connectivity

The original proposal contained a fourth category of metrics, "service availability/connectivity," that would measure the degree to which long-distance passengers are transferring among routes and the availability of

train service to communities lacking other public transport options—topics mandated by Congress in PRIIA Section 207. In recent months, the implementation of a new Federal policy toward intercity passenger rail—as exemplified by the HSIPR program and its strategic plan and interim guidance—has focused the Nation's attention on the full spectrum of public benefits inherent in the rail mode. Accordingly, the scope of the former "service availability/connectivity" category has been expanded to address "public benefits" generally. The measures of "connectivity" and "availability of other modes" will remain intact, as originally proposed, as part of "Public Benefits"; in addition, an analysis will be undertaken of opportunities for incorporating energy-saving and environmental measures into the Metrics and Standards. Proposals emanating from this analysis of Public Benefits will, of course, be made available for public comment.

With regard to the service availability/connectivity category of the original proposal, the only comment received was from NARP. ***Comment:*** NARP stated that intermediate stations currently receiving late night service should receive daytime service through increased frequencies rather than by adjusting schedules. NARP also recommended that language be modified to leave open the possibility of future additions to service. ***Response:*** The reduction in passenger rail service over the past half-century has left many long-distance routes with one daily train each way—a situation inevitably leaving many communities with poorly-timed service in one or both directions. Thus, NARP's comment treats a serious and difficult issue. Still, scheduling issues, including whether or not to increase train frequencies on a particular route, are a business decision outside the scope of

these Metrics and Standards—and indeed, are referred to in a separate section of PRIIA (Section 208).

METRICS AND STANDARDS FOR INTERCITY PASSENGER RAIL SERVICE

In accordance with Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), the Federal Railroad Administration (FRA) and Amtrak are jointly issuing the following Metrics and Standards for intercity passenger rail service. All Metrics and Standards will be measured and applied on a quarterly basis, except where otherwise noted.

Metric/ Standard Category	Metric/Standard Subcategory	Standard Applies By	Statutory Requirement	Added Measure	Standard: Comments
Financial	Percent of Short-Term Avoidable Operating Cost[11] Covered by Passenger-Related Revenue (exclude capital charges), both with and without State subsidy included in revenue	route	✓		Continuous year-over-year improvement on a moving eight-quarter average basis. Dollar-denominated metrics (surpluses/losses per passenger-mile) will be reported in constant dollars of the reporting year (based on the OMB GDP Chain Deflator).
	Percent of Fully Allocated Operating Cost[12] Covered by Passenger-Related Revenue (exclude capital charges), both with and without State subsidy included in revenue	route	✓		

[11] "Short-Term Avoidable Operating Costs" are those costs that would cease to exist one year after a specific route ceases to operate.

[12] "Fully-Allocated Costs" of a route are the total costs of operating the route, including all types of production costs (direct materials, direct labor, and fixed and variable overhead) and also a share of marketing, administrative, financing, and other central corporate expenses.

Metric/ Standard Category	Metric/Standard Subcategory	Standard Applies By	Statutory Requirement	Added Measure	Standard; Comments
	Long-term avoidable operating loss[13] per PM (exclude capital charges), both with and without State subsidy included in revenue	route		✓	
	Adjusted (Loss)[14] per passenger-mile, both with and without State subsidy included in revenue	system		✓	
	Passenger-Miles per Train-Mile	route	✓		

[13] The "long-term avoidable operating loss" of a route is the improvement in Amtrak's bottom line that would accrue five years after, and solely due to, the elimination of a given route.

[14] The definition of Adjusted (Loss) is: Net Loss of Amtrak's Operating Business Lines, adjusted to eliminate the effects of Depreciation, Other Post-Employment Benefits (OPEB's), project costs covered by capital funding, and net interest expense.

Metric/ Standard Category	Metric/Standard Subcategory	Standard Applies By	Statutory Requirement	Added Measure	Standard; Comments
On-Time Performance	**On-Time Performance (OTP).** This congressionally-mandated metric/standard will consist of two tests (Nos. 1 and 2) starting in FY 2010, and three tests (Nos. 1, 2, and 3) beginning in FY 2012. All tests applicable in a given quarter must be met.	Route[15]	✓		
	Test No. 1: Change in "Effective Speed"—which is defined as a train's mileage, divided by the sum of (a) the scheduled end-to-end running time plus (b) the average end-point terminal lateness.				Effective speed for each rolling four-quarter period must be equal to or better than the average effective speed during FY 2008.

[15] Each route comprises two or more trains (at least one in each direction). The Internet version of the quarterly Metrics and Standards report will contain a link to train-by-train information that will allow all stakeholders to characterize performance at the train level and facilitate compliance with all relevant sections of PRIIA.

Metric/ Standard Category	Metric/Standard Subcategory	Standard Applies By	Statutory Requirement	Added Measure	Standard: Comments
	Test No. 2: Endpoint OTP[16]				In FY 2010, Endpoint OTP must be at least 80% for all routes except Acela (90%) and other Northeast Corridor (NEC) corridor routes (85%).[17] By FY2014, Endpoint OTP must be at least 95% for Acela, 90% for

[16] A train is considered "late" if it arrives at its endpoint terminal more than 10 minutes after its scheduled arrival time for trips up to 250 miles; 15 minutes for trips 251-350 miles; 20 minutes for trips 351-450 miles; 25 minutes for trips 451-550 miles; and 30 minutes for trips of 551 or more miles. These tolerances are based on former ICC rules. The exception is that all Acela trips, regardless of run length, are considered late if they arrive at their endpoint terminal more than 10 minutes after their scheduled arrival time.

[17] For purposes of the Change in Effective Speed, Endpoint OTP, and All-Stations OTP metrics and standards, "other NEC corridor trains" are all Northeast Regional and Keystone service trains, including the Northeast Regional trains operating between Washington and points in Virginia.

Metric/ Standard Category	Metric/Standard Subcategory	Standard Applies By	Statutory Requirement	Added Measure	Standard; Comments
					all other NEC and non-NEC corridor routes,[18] and 85% for long-distance routes. If public Amtrak schedules are adjusted for major maintenance and construction projects (see Annex 1), Endpoint OTP will be calculated against the adjusted schedule.

[18] "Non-NEC corridor trains" refers to trains in all Amtrak services other than the Northeast Corridor trains (Acela, Northeast Regional, and Keystone), and other than the long-distance trains (Auto Train, California Zephyr, Capitol Limited, Cardinal, City of New Orleans, Coast Starlight, Crescent, Empire Builder, Lake Shore Limited, Palmetto, Silver Meteor, Silver Star, Southwest Chief, Sunset Limited, and Texas Eagle.)

Metric/ Standard Category	Metric/Standard Subcategory	Standard Applies By	Statutory Requirement	Added Measure	Standard: Comments
	Test No. 3 (Effective as of FY 2012): All-Stations OTP—which is defined as the percentage of train times (departure time from origin station and arrival time at all other stations) at all of a train's stations that take place within 15 minutes (10 minutes for Acela) of the time in the public schedule.[19]				Effectve FY 2012, All-Stations OTP must be at least 80% for all routes except Acela (90%) and other NEC corridor routes (85%). By FY 2014, All-Stations OTP must be at least 95% for Acela, 90% for all other NEC and non-NEC corridor routes, and 85% for long-distance routes. Results for this metric will be published beginning with the first report under Section

[19] The 15-minute tolerance for All-Stations OTP is based on 49 U.S.C. Section 24101(c)(4).

Metric/ Standard Category	Metric/Standard Subcategory	Standard Applies By	Statutory Require-ment	Added Measure	Standard: Comments
					207, even though the test is not in effect until FY 2012. If public Amtrak schedules are adjusted for major maintenance and construction projects (see Annex 1), All-Stations OTP will be calculated against the adjusted schedule.
Train Delays	**Train Delays.**[20] This Congressionally-mandated metric/standard will consist of two groups of tests—"off" and		✓		Annex 3 describes the rationale for the standards adopted in the Train Delay category.

[20] As calculated by Amtrak according to its existing procedures and definitions.

Metric/ Standard Category	Metric/Standard Subcategory	Standard Applies By	Statutory Requirement	Added Measure	Standard: Comments
	"on" the Northeast Corridor (NEC)[21]: See Annex 1 for special provisions with respect to train delay due to major planned maintenance and construction projects.				
	Train Delays—Off NEC				
	Amtrak-Responsible[22] Delays per 10,000 Train-Miles	**Route**[15]			Delays must be not more than 325 minutes per 10,000 Train-Miles.

[21] For this purpose, the NEC is defined as the entire main line between Boston, New York, and Washington, except for the portion owned by Metro-North between New Rochelle and New Haven. Also included in the NEC definition are the Keystone line between Philadelphia and Harrisburg and the Springfield line between New Haven, Hartford, and Springfield. Metro-North, on its New Rochelle-New Haven segment, is the host railroad.

[22] "Amtrak-responsible" refers to delays coded on Amtrak Conductor Delay Reports as Passenger-Related (ADA, HLD), Car Failure (CAR), Cab Car Failure (CCR), Connections (CON), Engine Failure (ENG), Injuries (INJ), LateInbound Train (ITI), Service (SVS), System (SYS), or Other Amtrak-Responsible (CTH).

Metric/ Standard Category	Metric/Standard Subcategory	Standard Applies By	Statutory Requirement	Added Measure	Standard: Comments
	Host-Responsible[23] Delays per 10,000 Train-Miles	**Route[15] and host**			Delays must be not more than 900 minutes per 10,000 Train-Miles. Major reported causes of delay will also be shown for information (with no standard attached to them). The 900-minute standard is intended to absorb routine/seasonal maintenance, track work, and other routine construction projects.

[23] "Host-responsible" refers to delays coded on Amtrak Conductor Delay Reports as Freight Train Interference (FTI), Slow Orders (DSR), Signals (DCS), Routing (RTE), Maintenance of Way (DMW), Commuter Train Interference (CTI), Passenger Train Interference (PTI), Debris Strikes (DBS), Catenary or Wayside Power System Failure (DET, used in electrified territory only), or Detours (DTR).

Metric/ Standard Category	Metric/Standard Subcategory	Standard Applies By	Statutory Requirement	Added Measure	Standard: Comments
					On a case-by-case basis, an additional delay allowance above this standard may also be applied to account for major maintenance and construction projects. See Annex 1 for further details.
	Train Delays—On NEC: Total Delays[24] per 10,000 Train-Miles	**Route[15] and host**			Delays must be not more than 265 minutes per 10,000 Train-Miles for Acela, and 475 minutes per 10,000 Train-Miles for all other services on the NEC. Reported causes of delay

[24] "Total delays" for purposes of the NEC delay standard is all delays except 3rd Party delays.

Metric/ Standard Category	Metric/Standard Subcategory	Standard Applies By	Statutory Requirement	Added Measure	Standard: Comments
					will also be shown for information (with no standard attached to them). The 265- and 475-minute standards are intended to absorb routine/seasonal maintenance, track work, and other routine construction projects. On a case-by-case basis, an additional delay allowance above this standard may also be applied to account for major maintenance and construction projects. See Annex 1 for further details.

Metric/ Standard Category	Metric/Standard Subcategory	Standard Applies By	Statutory Requirement	Added Measure	Standard; Comments
Other Service Quality	**The following metrics and standards are based on Amtrak's Customer Satisfaction Index:**				
	Percent of Passengers "Very Satisfied"[25] with Overall Service	route	✓		82 percent in 2010; 90 percent by 2014
	Percent of Passengers "Very Satisfied" with Amtrak personnel	route	✓		80 percent in 2010; 90 percent by 2014
	Percent of Passengers "Very Satisfied" with Information Given	route	✓		
	Percent of Passengers "Very Satisfied" with On-Board Comfort	route	✓		

[25] "Very Satisfied" with the service quality is defined as a score in the top three steps on a scale of eleven evaluation ratings that respondents can ascribe to each facet of the service. For a given service factor, "80 percent" means that 80 percent of respondents rated Amtrak in the top three of the eleven steps of the scale.

Metric/ Standard Category	Metric/Standard Subcategory	Standard Applies By	Statutory Requirement	Added Measure	Standard; Comments
	Percent of Passengers "Very Satisfied" with On-Board Cleanliness	route	✓		
	Percent of Passengers "Very Satisfied" with On-Board Food Service	route	✓		
	Future: Percent of Passengers "Very Satisfied" with the overall station experience	route	✓		Future metric and standard; standard to be determined
	Future: Percent of Passengers "Very Satisfied" with the overall sleeping car experience	route	✓		Future metric and standard; standard to be determined

Metric/ Standard Category	Metric/Standard Subcategory	Standard Applies By	Statutory Require-ment	Added Measure	Standard; Comments
	The following measures are for information only and are based on sources other than the Customer Satisfaction Index.				
	Equipment-caused service interruptions per 10,000 train-miles	**route**	✓		Metric only. This is an initial metric, intended to reflect objectively the quality of mechanical maintenance as perceived by the passenger. No standard is proposed.
	Presentation of Amtrak passenger comment data by subject matter and major route grouping (NEC, other corridors, long-distance)	**type of route**		✓	Information only. No standard proposed; presented as supplementary information.

Metric/ Standard Category	Metric/Standard Subcategory	Standard Applies By	Statutory Requirement	Added Measure	Standard; Comments
Public Benefits	Connectivity measure: Percent of passengers connecting to/from other routes. To be updated annually.	long-distance route	✓		Metric only. No standard possible; improvement could require network changes
	Availability of other modes: Percent of passenger-trips to/from underserved communities.[26] To be updated annually.	route, system	✓		Metric only. No standard possible; improvement could require network changes
	Energy-Saving and Environmental Measures. This is a new grouping of one or more measures under "Public Benefits." A forthcoming analysis will identify various methodologies for incorporating environmental benefits and energy savings into these Metrics and Standards at a later date. Any proposals in this regard will be made available for public comment.				

[26] "Underserved communities" would be defined for this purpose as those more than 25 miles from a place with 50,000 or more inhabitants. This definition, which assumes that places with a population of 50,000 or more (and their environs within a radius of 25 miles) are not "underserved," is preliminary and subject to change as research progresses.

List of Annexes

Annex 1: Additional Delay Allowance for Major Maintenance and Construction Projects

Annex 2: Collaboration Anticipated in Achieving Metrics and Standards

Annex 3: Explanation of Train Delay Analysis

Annex 4: Lists of Parties Submitting Written Comments

Annex 1: Additional Delay Allowance for Major Maintenance and Construction Projects

- To facilitate advance planning for major maintenance and construction projects and thereby minimize customer impact of such projects, Amtrak and individual host railroads may agree that during a specific quarter, a specific train will incur more Host- or Amtrak-responsible delay than usual due to a major maintenance and construction project.
- The Section 207 delay standards (e.g., 900 minutes of host-responsible delay per 10,000 train-miles off-NEC) are intended to absorb routine track work, signal, and related maintenance (including seasonal work), and other routine or small projects. As such the process described herein applies only to major maintenance and construction projects. "Major maintenance and construction projects" are typically characterized by:
    - Sufficient scale and scope that they cannot be absorbed by normal recovery time and delay standards. "Sufficient scale and scope" are typically indicated by a combination of at least three of the following:

- System gang rather than Division gang
- Host is changing freight schedules
- Project duration at least 4 days
- Affects at least half of Amtrak trains in the affected Amtrak service

o Planned sufficiently in advance to allow at least 4 weeks advance notice to Amtrak (e.g., to allow schedules to be adjusted and passengers to be notified as appropriate)

o Duration of the work is limited in both time and geography (the project has dedicated resources, a timeline, and a conclusion; it is not ongoing maintenance on a route all season long)

- FRA's quarterly report will indicate any major maintenance and construction allowance agreed upon by Amtrak and the host for that quarter.

o Amtrak will keep records of any major maintenance and construction allowances, and will provide this information to FRA quarterly for inclusion in the report

o Delay minutes will continue to be recorded and reported normally

- Where a major maintenance and construction allowance has been agreed upon by Amtrak and a host, the delay standard is considered to be met if either of the following is true:

1. Delays are within the applicable standard (e.g., 900 minutes of host-responsible delay per 10,000 train-miles off NEC; 325 minutes of

Amtrak-responsible delay per 10,000 train-miles off NEC), or

2. Delays are within the applicable standard plus applicable major maintenance and construction allowance

- Where public Amtrak schedules are adjusted in response to major maintenance and construction, All-Stations OTP and Endpoint OTP will be reported against the adjusted schedules. Therefore, the OTP standards will not be adjusted for major maintenance and construction.

Due to the increased impact to customers when major maintenance and construction plans are changed close to the actual date of the work, unless otherwise agreed by Amtrak and the host, major maintenance and construction allowances shall apply only if the work is done in accordance with the plan (e.g., agreed-upon dates, schedule changes, etc.) originally agreed to by Amtrak and the host.

Annex 2: Collaboration Anticipated in Achieving Metrics and Standards

Good-faith collaboration between Amtrak and host railroads, as well as State and other stakeholders as appropriate, will be needed to ensure that the implementation of the above Section 207 standards is a success. Subject to the parties' statutory rights, examples of such collaborative efforts may include:

- Review of passenger and freight schedules, in particular to ensure that Amtrak schedule Recovery Time is appropriately allocated to support the All-Stations OTP standard. Amtrak and hosts may also explore temporarily lengthening Amtrak

schedules vs. today during periods with seasonal operating variations, such as major maintenance and construction projects,[27] and potentially shortening Amtrak schedules vs. today where appropriate. The preferences of, and of course the contractual obligations of Amtrak and the host railroads toward State stakeholders will be fully taken into account in any such exploratory talks. Where available, joint host-Amtrak simulation modeling may be used as a source of information in evaluating schedules and recovery time assumptions, within the context of the Performance Improvement Program process.

- Collaborating to establish new analytical and reporting processes based on the Section 207 Standards. For example, for hosts that today measure themselves internally based on the compensation (incentive/penalty) provisions of their operating agreements with Amtrak, Amtrak and FRA anticipate that host internal management reports will need to be revised to monitor compliance with Section 207 Standards. Amtrak and hosts can work collaboratively to design new reporting processes.

- Potential automation of station arrival and departure time recording. Amtrak is currently working on these data enhancements.

- Expansion of Performance Improvement Programs as an opportunity to focus in more detail on potential operating, maintenance, and capacity im-

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[27] Variations for major maintenance and construction projects will be subject to the process outlined in Annex 1.

provements on individual routes, including incorporating the above processes as appropriate. Performance Improvement Programs may be used to analyze traffic patterns and to validate freight and passenger train operating plans to ensure they are designed to allow passenger trains to achieve the Section 207 Standards.

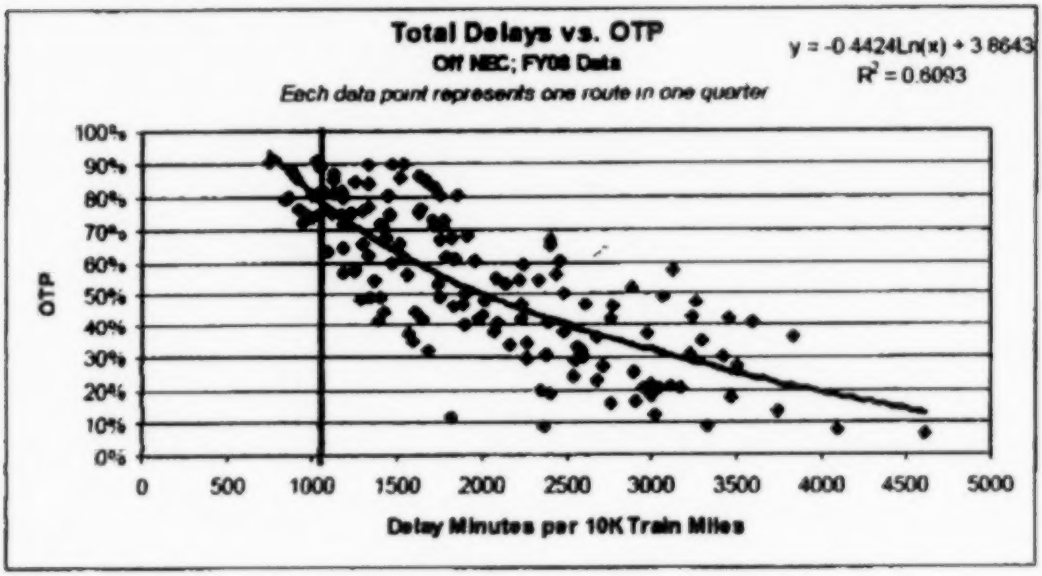
The above is not intended to affect, add to, or detract from the responsibilities of any party under the Section 207 Metrics and Standards.

Annex 3: Explanation of Train Delay Analysis

Regressions were run to determine the relationship between percent on time and delay minutes per 10,000 train-miles. Separate studies were undertaken for Northeast Corridor (NEC) and off-Northeast Corridor routes, in order to account for the difference in how delays are measured in the Northeast Corridor as well as the desire to set tighter standards for Northeast Corridor operations than for host railroad operations.

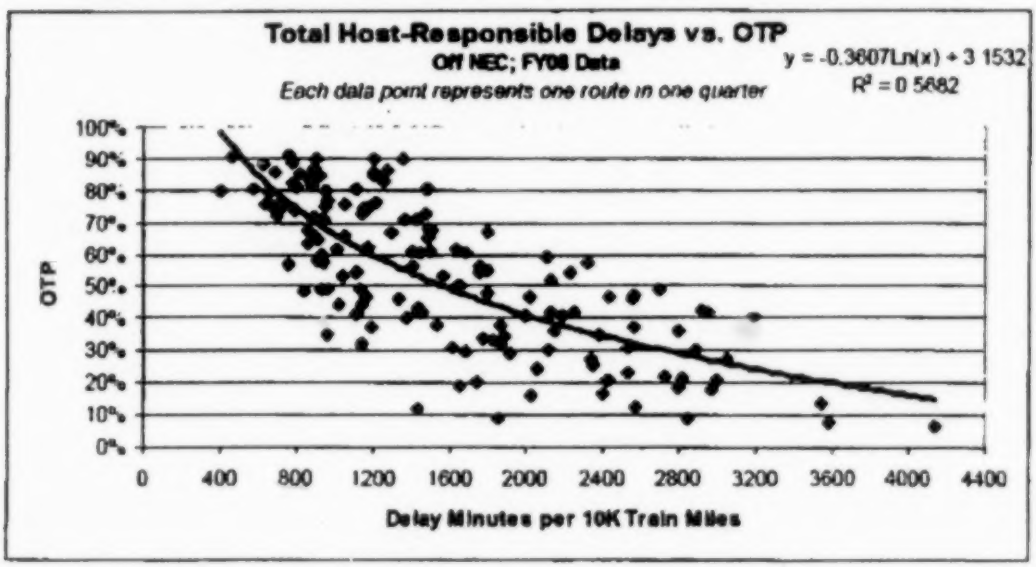
Off the Northeast Corridor, it was determined that 1,030 minutes of delay per 10,000 train miles correlates with an 80 percent endpoint on time arrival rate (see Figure A-1). After rounding up to 1,050 minutes, this delay must be apportioned between Host, Amtrak, and 3rd Party responsible causes.

Figure A-1: Total Delays off the NEC Corridor vs. Percent On Time



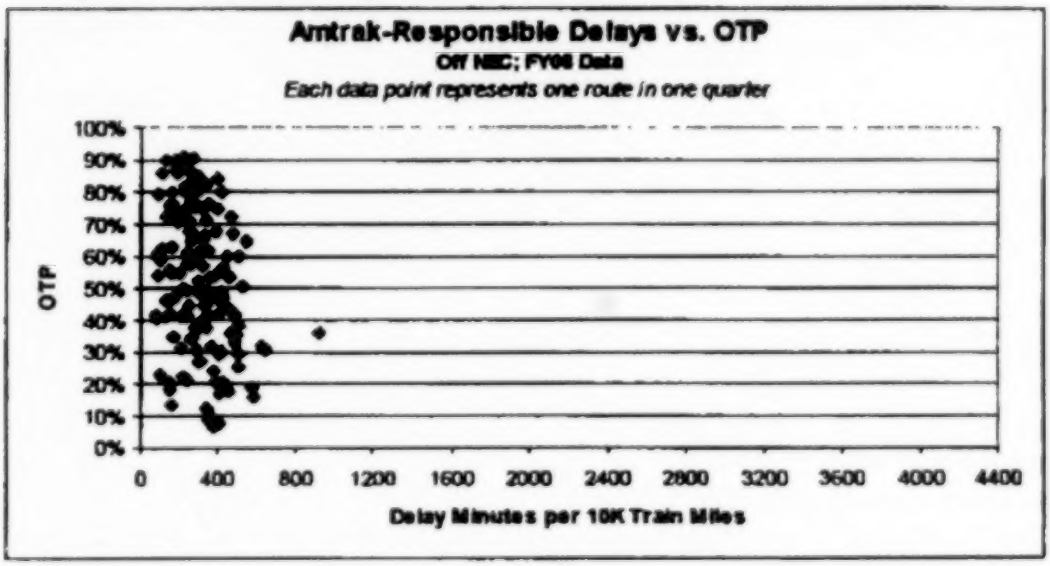
Regressions were then run to determine the relationship between host-responsible delays and OTP. This analysis found that 690 minutes of host-responsible delay per 10,000 train miles correlates with 80% OTP (Figure A-2). This number was rounded up to generate the originally-proposed standard of 700 minutes per 10,000 train miles.

Figure A-2: Total Host Responsible Delays off the NEC vs. Percent On Time



As illustrated in Figure A-3, Amtrak-responsible delays off the Northeast Corridor are not a large enough portion of total delays to independently drive OTP up or down. Therefore, the non-Host delays (1,050 – 700 = 350 mins) were apportioned between Amtrak and 3rd Party responsibility based on historical experience. During the study period of Amtrak's FY 2008, Amtrak delays represented 70% of combined Amtrak and 3rd-Party (i.e., non-Host) delay minutes. The standard for Amtrak-responsible delays therefore was originally proposed as 70% of 350 minutes = 245 minutes, rounded up to 250 minutes per 10,000 train miles.

Figure A-3: Amtrak Responsible Delays off the NEC vs. Percent On Time



The final delay standards for Host- and Amtrak-responsible delays have been adjusted to 900 minutes and 325 minutes, respectively, per 10,000 train miles. This standard represents a 30 percent increase in allowable delays but is within the regression range that correlates to OTP. This adjustment is intended to:

- Ensure that the delay standards are sufficient to absorb any seasonal variations and/or routine

maintenance or construction projects where the Major Maintenance and Construction adjustments outlined in Annex 1 have not been granted

- Allow Amtrak and hosts additional flexibility to collaborate in how to achieve the OTP standards, which must be met regardless of whether or not the delay standards also are met in a particular situation.

Similar regression studies were undertaken to determine the correlation between endpoint on-time performance and minutes of delay on the Northeast Corridor[28]. Two separate studies were completed, one for Acela Express service using a 90% endpoint arrival rate and one for Northeast Regional/Keystone services using an 85% endpoint arrival rate.

An existing Acela Express mathematical regression model was applied using daily FY08 data to determine the minutes of delay threshold that correlates to 90% endpoint on time performance. It was determined that 285 minutes of delay per 10,000 train miles was the midpoint of the high-low delay minutes range that correlates with a 90% endpoint on time arrival rate. Delays per 10,000 train miles were then apportioned across the delay categories based on minutes of delay incurred by each category in FY08.

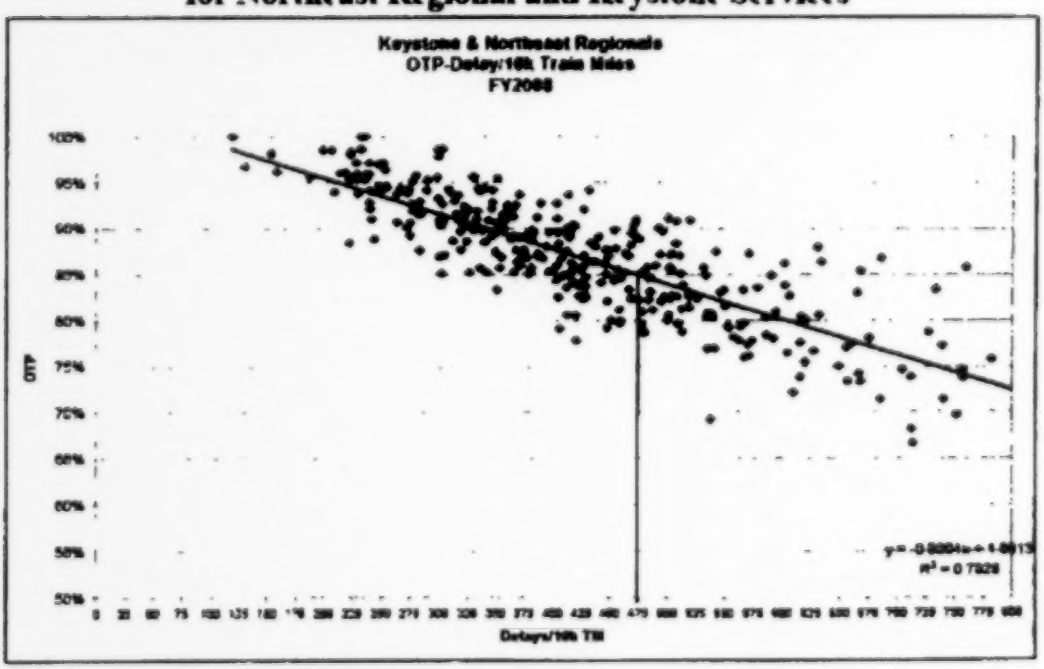
The Keystone & Northeast Regionals On Time Performance (OTP)-Delay study used daily performance and delay data from FY08. The study evaluated the relationship between OTP and delays. OTP was defined as the share of trains that arrived at endpoint within their end-

[28] Off-Northeast Corridor Host railroad delay standards apply to Metro North Railroad.

point tolerance for a particular day and delays were defined as total delay minutes incurred normalized to 10,000 miles operated. The OTP and delay data were plotted and the relationship (shape, slope, intercept, R^2) calculated. The total delay target of 470 minutes of delay per 10,000 train miles was derived by finding the total delays incurred on days when endpoint arrival performance was 85% or better. It was determined that 470 minutes of delay per 10,000 train miles was the mid-point of the high-low delay minutes range that correlates with an 85% endpoint on time arrival rate (Figure A- 4). Delays per 10,000 train miles were then apportioned across the delay categories based on minutes of delay incurred by each category in FY08.

Similar to off-Northeast Corridor delays, the final delay standards for on-NEC delays where Amtrak is Host and is responsible for all delays except third party delays has been adjusted to 265 minutes of delay per 10,000

Figure A- 4: Total Delays on the NEC vs. Percent On Time for Northeast Regional and Keystone Services



train miles for Acela Express and 475 minutes of delay for all other services. These standards represent total delays not including third party delays and represent an adjustment in allowable delays that is within the regression range that correlates to OTP. The adjustment of the standards is intended to ensure that the delay standards are sufficient to absorb any seasonal variations and/or routine maintenance or construction projects where the Major Maintenance and Construction adjustments outlined in Annex 1 have not been used.

Annex 4: Lists of Parties Submitting Written Comments Listing by Type of Respondent

State Departments of Transportation
California Department of Transportation, Division of Rail (Caltrans)
Maryland Transit Administration (MTA)
Virginia Department of Rail and Public Transportation (VDOT)
Washington State Department of Transportation (WSDOT)
Wisconsin Department of Transportation, Railroads and Harbors Section (WisDOT)
State Intercity and Commuter Passenger Rail Agencies
Capitol Corridor Joint Powers Authority (CCJPA)
Metro-North Commuter Railroad Company (MNR)
Southern California Regional Rail Authority (SCRRA)
Freight Host Railroads
Burlington Northern Santa Fe Railway (BNSF)
CSX Corporation (CSX)

Norfolk Southern Corporation (NS)
Railroad-Related Organizations
Association of American Railroads (AAR)
Midwest High Speed Rail Association (MHSRA)
National Association of Railroad Passengers (NARP)
Labor Unions
Transport Workers Union of American, Railroad Division (TWU)
Unaffiliated Individuals
Anne Marie Desiderio
Federal Agencies
Surface Transportation Board (STB)

Alphabetical Listing of Respondents

Anne Marie Desiderio
Association of American Railroads (AAR)
Burlington Northern Santa Fe Railway (BNSF)
California Department of Transportation, Division of Rail (Caltrans)
Capitol Corridor Joint Powers Authority (CCJPA)
CSX Corporation (CSX)
Maryland Transit Administration (MTA)
Metro-North Commuter Railroad Company (MNR)
Midwest High Speed Rail Association (MHSRA)
National Association of Railroad Passengers (NARP)
Norfolk Southern Corporation (NS)

Southern California Regional Rail Authority (SCRRA)
Surface Transportation Board (STB)
Transport Workers Union of America, Railroad Division (TWU)
Virginia Department of Rail and Public Transportation (VDOT)
Washington State Department of Transportation (WSDOT)
Wisconsin Department of Transportation, Railroads and Harbors Section (WisDOT)

[Published in *Federal Register*: May 12, 2010]

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA-200-0016]

Metrics and Standards for Intercity Passenger Rail Service under Section 207 of the Passenger Rail Investment and Improvement Act of 2008

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Response to Comments; Issuance of Metrics and Standards.

SUMMARY: Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (Division B of Pub. L. 110-432) (PRIIA) charged the Federal Railroad Administration (FRA) and Amtrak jointly and in consultation with other parties, with developing new or improving existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations. In compliance with the statute, the FRA and Amtrak jointly drafted performance metrics and standards for intercity passenger rail service and, on March 13, 2009, posted a draft document, entitled "Proposed Metrics and Standards for Intercity Passenger Rail Service," on the FRA's Web site. Simultaneously, the FRA published a notice in the **Federal Register** (74 FR 10983) requesting comments on the Proposed Metrics and Standards from the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers. Seventeen

comments were submitted to the corresponding docket (number FRA-2009-0016) at regulations.gov by the end of the comment period on March 27, 2009 and as a result, the FRA and Amtrak have jointly made, and are jointly issuing, revisions to the Metrics and Standards. The final version of the Metrics and Standards is posted on the FRA's Web site at *http://www.fra.dot.gov/us/content/2165.*

DATES: These Metrics and Standards are in effect as of May 11, 2010.

FOR FURTHER INFORMATION CONTACT: Neil E. Moyer, Chief, Financial and Economic Analysis Division, Office of Passenger and Freight Programs, Office of Railroad Policy and Development, Federal Railroad Administration, U.S. Department of Transportation (e-mail *Neil.Moyer@dot.gov*; telephone 202-493-6365); or Edgar E. Courtemanch, Sr. Principal, Operations Service Planning, Amtrak (e-mail *CourteE@amtrak.com*; telephone 202-906-3249).

Issued in Washington, DC, on May 6, 2010.

Neil E. Moyer,

Chief, Financial and Economic Analysis Division.

[FR Doc. 2010-11261 Filed 5-11-10; 8:45 am]

BILLING CODE 4910-06-P

Pursuant to Section 207
of the Passenger Rail Investment and Improvement Act
of 2008 (Public Law 110-432, Division B):

Quarterly Report on the Performance and Service Quality of Intercity Passenger Train Operations

Covering the Quarter Ended September 30, 2010

[LOGO OMITTED]

Federal Railroad Administration
United States Department of Transportation

Published February 2011

[LOGO OMITTED]

U.S. Department of Transportation
Federal Railroad Administration

1200 New Jersey Avenue, SE
Washington, DC 20590

Administrator

[FEB 22 2011]

To the Reader:

Section 207(b) of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA—Division B of Public Law 110-432) stipulates that "the Administrator of the Federal Railroad Administration [FRA] shall collect the necessary data and publish a quarterly report on the performance and service quality of intercity passenger train operations, including Amtrak's cost recovery, ridership, on-time performance and minutes of delay, causes

of delay, on-board services, stations, facilities, equipment, and other services." Section 207(a) of the PRIIA states that Amtrak "shall provide reasonable access to the Federal Railroad Administration in order to enable the Administration to carry out its duty under this section."

What follows is the first quarterly report under PRIIA Section 207(b). In publishing this report, I wish to acknowledge that Amtrak has not only provided the "reasonable access" called for in the PRIIA, but has also provided the data necessary to populate this report, in formats jointly developed with FRA staff. Amtrak's wholehearted cooperation with FRA in meeting the Section 207 requirements—from our joint development of the Metrics and Standards to the preparation of this report—is both praiseworthy and sincerely appreciated.

I hope that the information contained in this report will assist stakeholders in intercity passenger rail, as well as the public at large, in gauging the current quality of service of this increasingly important mode of transportation.

Sincerely,

/s/ JOSEPH C. SZABO
JOSEPH C. SZABO

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:11-cv-01499-JEB
ASSOCIATION OF AMERICAN RAILROADS,
425 3RD STREET, SW, SUITE 1000
WASHINGTON, DC 20024, PLAINTIFF

v.

DEPARTMENT OF TRANSPORTATION,
1200 NEW JERSEY AVENUE, SE
WASHINGTON, DC 20590

RAY LAHOOD, IN HIS OFFICIAL CAPACITY
AS SECRETARY OF TRANSPORTATION,
1200 NEW JERSEY AVENUE, SE
WASHINGTON, DC 20590

FEDERAL RAILROAD ADMINISTRATION,
1200 NEW JERSEY AVENUE, SE
WASHINGTON, DC 20590

JOSEPH C. SZABO, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR, FEDERAL RAILROAD ADMINISTRATION;
1200 NEW JERSEY AVENUE, SE
WASHINGTON, DC 20590, DEFENDANTS

[Filed: Aug. 19, 2011]

COMPLAINT

Plaintiff, by and through its attorneys, alleges as follows:

INTRODUCTION

1. This is a constitutional challenge to a statute that purports to vest Amtrak—a private, for-profit corporation—with the authority to promulgate binding rules governing the conduct of its contractual partners, the freight railroads.

2. Congress enacted the Passenger Rail Investment and Improvement Act of 2008 (Division B of Pub. L. 110-432) (Oct. 16, 2008) ("PRIIA") (Ex. A) as a response to Amtrak's historically poor record of on-time performance and its chronic inability to generate revenues sufficient to cover its operating costs. Section 207 of PRIIA provides that Amtrak and the Federal Railroad Administration (FRA) "shall jointly . . . develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations. . . ."

3. Amtrak runs its trains outside the Northeast Corridor on tracks owned by private freight railroads. Section 213 of PRIIA provides that if Amtrak trains do not meet the Amtrak-drafted performance standards, the Surface Transportation Board may assess damages, payable directly to Amtrak, against the freight railroad hosting the Amtrak trains if the Board determines that the freight railroad is at fault by failing to give preference to the Amtrak trains.

4. Amtrak and the FRA jointly promulgated the "Metrics and Standards for Intercity Passenger Rail Service" on May 6, 2010 (Ex. B). The Metrics and Standards establish performance standards for Amtrak trains

that cannot be achieved as a practical matter on numerous routes, and look to Amtrak-generated "Conductor Delay Reports" as the best evidence for determining whether the railroads are at fault for failure to meet the standards.

5. Section 207 of PRIIA is unconstitutional because it improperly delegates lawmaking and rulemaking authority to a private company, and the Metrics and Standards—which were promulgated pursuant to Section 207—are invalid.

6. Amtrak "is not a department, agency, or instrumentality of the United States Government." 49 U.S.C. § 24301(a). Rather, it is a private entity that is "operated and managed as a for-profit corporation." *Id.* PRIIA purports to vest Amtrak with the power to issue binding regulations governing the business operations of the freight railroads. It is a bedrock principle of constitutional law that Congress cannot empower a private entity to regulate other participants in the same industry. The constitutional violation is more egregious in this case because Amtrak is a financially interested private party that stands to directly benefit from violations of the very rules it created, and thus had the incentive to draft the Metrics and Standards in ways that were favorable to Amtrak and at the expense of the freight railroads. Section 207 of PRIIA has created a system in which Amtrak is now poised to reap substantial payments from the parties it is regulating, based on evidence that Amtrak will generate.

7. For these reasons, this Court should issue an order declaring that Section 207 of PRIIA is unconstitutional and vacating the Metrics and Standards because

they were promulgated pursuant to an unconstitutional statute.

JURISDICTION AND VENUE

8. This is a challenge to the constitutionality of certain provisions of PRIIA, Division B of Pub. L. 110-432. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, and may issue declaratory relief under 28 U.S.C. § 2201.

9. Venue is proper in this Court under 28 U.S.C. § 1391(e) because this is an action against officers and agencies of the United States; the Department of Transportation and the Federal Railroad Administration reside in this judicial district; Secretary LaHood and Administrator Szabo perform their official duties in this judicial district; and a substantial part of the events or omissions giving rise to this action occurred in this judicial district.

PARTIES

10. Plaintiff Association of American Railroads ("AAR") is a nonprofit trade association whose members include all of the Class I freight railroads (the largest freight railroads), as well as some smaller freight railroads and Amtrak. AAR represents its member railroads in proceedings before Congress, the courts, and administrative agencies in matters of common interest, such as the issues that are the subject matter of this litigation. AAR brings this action on behalf of its Class I member freight railroads: BNSF Railway Company, Canadian National Railway Company, Canadian Pacific Railway Limited, CSX Transportation, Inc., Kansas City Southern Railway Company, Norfolk Southern Railway Company, and Union Pacific Railroad.

11. Outside the Northeast Corridor, Amtrak trains are operated on tracks owned by AAR's freight railroad

members. Consequently, AAR's members are immediately and directly impacted and harmed by PRIIA and the Metrics and Standards, which limit their ability to operate efficient rail networks and serve their customers. By mandating far better on-time performance than has been achieved in the past, the Metrics and Standards place greater demands on the host freight railroads and adversely affect their operations. Attempting to ensure the on-time performance of Amtrak trains necessarily impacts the operation and scheduling of freight traffic that runs on the same tracks. Among other things:

- The presence of Amtrak trains on a freight line, combined with the need to give them dispatching priority, limits the discretion dispatchers have to maximize freight fluidity and capacity on the line.
- Passenger operating schedules impair a freight railroad's ability to run certain types of freight, including time-sensitive shipments.
- Passenger operations affect a host freight railroad's ability to perform maintenance on its lines, because the passenger train schedules constrain the creation of efficient "maintenance windows" in which the work can be performed without delaying rail traffic.
- Because of the relatively higher speeds of passenger trains, and the safety need to separate passenger from freight operations, passenger trains consume a disproportionate share of the capacity or "train slots" available on a line.

12. The FRA has released three quarterly reports demonstrating that the Metrics and Standards are not being satisfied on numerous routes, thus placing the

freight railroads in continuing legal jeopardy. The freight railroads are now subject to mandatory government investigations at Amtrak's request and face the prospect of substantial civil damage awards.

13. Section 207 of PRIIA also has an immediate impact on AAR's members in that it directs the freight railroads to "incorporate the metrics and standards . . . into their access and service agreements" with Amtrak "[t]o the extent practicable."

14. Defendant Ray LaHood is sued in his official capacity as Secretary of the U.S. Department of Transportation (DOT). Secretary LaHood is the federal official ultimately responsible for the actions and operations of the Department of Transportation, of which the FRA is a part. Secretary LaHood exercises cabinet-level oversight and supervisory authority over the management and policy of the FRA. Secretary LaHood is thus responsible, in his official capacity, for the FRA's role in the unlawful promulgation of the Metrics and Standards and for the related acts and omissions alleged herein.

15. Defendant DOT is an executive agency of the United States Government located at 1200 New Jersey Avenue, SE, Washington, DC 20590.

16. Defendant Joseph C. Szabo is sued in his official capacity as Administrator of the FRA. PRIIA gives the FRA joint authority for developing Metrics and Standards for measuring passenger train performance. Administrator Szabo is the federal official responsible for the operation and management of the FRA and is therefore responsible, in his official capacity, for the FRA's role in the unlawful promulgation of the Metrics and

Standards and for the related acts and omissions alleged herein.

17. Defendant FRA is sued as the federal agency to which Congress delegated joint authority for promulgating the Metrics and Standards. The FRA is an executive agency of the United States Government located at 1200 New Jersey Avenue, SE, Washington, DC 20590.

18. Defendants, and those subject to their supervision, direction, and control are responsible for the actions complained of herein. The relief requested in this action is sought against each Defendant, as well as against each Defendant's officers, employees, and agents, and against all persons acting in cooperation with Defendant(s), under their supervision, at their direction, or under their control.

BACKGROUND

A. The Birth of Amtrak

19. In the 1960s, many private railroads offered passenger service. By then, the creation of the interstate highway system and the growth of air travel, among other things, had already weakened the economics of passenger rail service, which had been the principal means of intercity passenger travel for more than a century. Although passenger service was not profitable—and the railroads that offered it incurred heavy losses doing so—they were common carriers and therefore required to offer passenger service unless relieved of this responsibility by the Interstate Commerce Commission or state regulatory authorities. In light of the economics, many railroads sought permission to discontinue passenger service.

20. In 1970, Congress enacted the Rail Passenger Service Act to revive the failing intercity passenger train industry. The Act established the National Railroad Passenger Corporation, better known as Amtrak, to assume the role of provider of intercity passenger rail service. Congress has specifically provided that Amtrak "is not a department, agency, or instrumentality of the United States Government" but is rather a private, "for-profit corporation" authorized by the Government to operate intercity passenger rail service. *See* 49 U.S.C. § 24301(a).

21. Amtrak began offering passenger service on May 1, 1971. Because the nation's rail infrastructure was at the time largely owned by the freight railroads, the only option was to operate Amtrak's passenger trains on the freight railroads' tracks. The same is true today: Amtrak runs primarily on tracks owned by freight railroads. In fact, 97 percent of the 22,000 miles of track over which Amtrak operates is owned by freight railroads.

22. Amtrak has entered into contracts with the freight railroads that host the Amtrak trains. These contracts—commonly known as operating agreements—are painstakingly negotiated documents that were executed soon after Amtrak's creation and have been amended or renegotiated over the years. The operating agreements generally provide that the railroads will grant Amtrak the use of their tracks at agreed-upon rates, and spell out the rights and duties of the parties, consistent with the freight railroads' statutory obligations. The FRA has described the operating agreements between Amtrak and its host railroads as "private agreements among private parties." *See* Report of the Inspector General, U.S. Department of Transportation, *Amtrak Cascades and Coast*

Starlight Routes: Implementation of New Metrics and Standards Is Key to Improving On-Time Performance (Sept. 23, 2010).

B. Amtrak's Difficulties

23. Amtrak is not, and has never been, self-sufficient. It relies on heavy federal subsidies to continue operations. There are many reasons for the problems that plague Amtrak: travelers prefer cars for short trips; air travel is far faster and often less expensive for long trips; many Amtrak stations lack nearby car rental facilities; and much of Amtrak's equipment is antiquated.

24. In addition to these difficulties, Amtrak has long struggled to run its trains on time. Its endemic delays have, in turn, deterred travelers from choosing Amtrak, thereby making its precarious financial situation even worse. In 2007, Congress requested the U.S. Department of Transportation's Inspector General "to produce a quantitative assessment of Amtrak's poor OTP [On-Time Performance]." The Inspector General concluded that "Amtrak's poor OTP significantly undermines the viability of intercity passenger rail as an option for travelers and weakens Amtrak's financial position by reducing its revenues and increasing its operating costs." The report further determined that:

> Amtrak is unable to generate sufficient revenues from ticket sales and other sources to cover its operating costs or pay any of its debt or capital costs. As a result, in FY 2008, Amtrak will receive a Federal subsidy of $1.3 billion, including $475 million in operating subsidies. Poor OTP reduces ridership on Amtrak trains because potential passengers cannot predict when their train will arrive. It also increases costs,

> primarily by extending shifts, increasing staffing requirements, and utilizing more fuel. Improving OTP could significantly improve Amtrak's finances.

See Report of the Inspector General, U.S. Department of Transportation, *Effects of Amtrak's Poor On-Time Performance* (March 28, 2008).

C. The Passenger Rail Investment and Improvement Act of 2008

25. On October 16, 2008, Congress passed the Passenger Rail Investment and Improvement Act of 2008 (Division B of Pub. L. 110-432) (PRIIA). PRIIA reauthorizes Amtrak, and makes numerous amendments to Title 49 of the U.S Code.

26. Section 207(a) of PRIIA purports to authorize Amtrak, jointly with the Federal Railroad Administration, to develop and promulgate binding "metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations." It provides:

> Within 180 days after the date of enactment of this Act [Oct. 16, 2008], the Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of

delay, ridership, on-board services, stations, facilities, equipment, and other services.

27. Section 207(a) of PRIIA further provides: "Such metrics, at a minimum, shall include the percentage of avoidable and fully allocated operating costs covered by passenger revenues on each route, ridership per train mile operated, measures of on-time performance and delays incurred by intercity passenger trains on the rail lines of each rail carrier and, for long-distance routes, measures of connectivity with other routes in all regions currently receiving Amtrak service and the transportation needs of communities and populations that are not well-served by other forms of intercity transportation."

28. Section 207(c) of PRIIA, entitled "Contracts With Host Rail Carriers," provides: "To the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards developed under subsection (a) into their access and service agreements."

29. Section 213 of PRIIA provides: "If the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters . . . the Surface Transportation Board may initiate an investigation, or upon the filing of a complaint by Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service, the Board shall initiate such an investigation."

30. As part of its investigation, the Board shall "determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasona-

bly addressed by Amtrak or other intercity passenger rail operators." PRIIA, § 213. "If the Board determines that delays or failures to achieve minimum standards . . . are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation," as required by 49 U.S.C. § 24308(c), "the Board may award damages against the host rail carrier" and "prescrib[e] such other relief to Amtrak as it determines to be reasonable and appropriate." PRIIA, § 213.

31. In fashioning a remedy, the Board may consider the need for compensation as well as deterrence, and may "order the host rail carrier to remit the damages awarded under this subsection to Amtrak," which must use the money "for capital or operating expenditures on the routes" at issue. PRIIA § 213.

32. The statute also provides that compliance with the Metrics and Standards may be relevant factors in choosing among competitive bidders under PRIIA § 214, and in allocating capital grants benefiting the states under PRIIA § 301.

D. The Metrics and Standards

33. Pursuant to the statutory mandate, Amtrak and the FRA jointly drafted Metrics and Standards for measuring the on-time performance and train delays for Amtrak trains operated on tracks owned by the freight railroads.

34. On March 13, 2009, Amtrak and the FRA posted their proposed Metrics and Standards on the FRA's website. The FRA simultaneously filed a notice in the Federal Register requiring that comments on the proposed Metrics and Standards be submitted within 14

days. *See* Metrics and Standards for Intercity Passenger Rail Service, 74 Fed. Reg. 10983 (March 13, 2009).

35. On May 6, 2010, Amtrak and the FRA jointly issued their responses to the comments and issued their final rule establishing the Metrics and Standards. The Metrics and Standards became effective on May 11, 2010. *See* Metrics and Standards for Intercity Passenger Rail Service, 75 Fed. Reg. 26839 (May 12, 2010). The FRA posted the Metrics and Standards on its website. *See* www.fra.dot.gov/us/content/2165.

On-Time Performance

36. The Metrics and Standards provide that Amtrak's on-time performance be assessed by three metrics: Effective Speed, Endpoint On-Time-Performance, and All-Stations On-Time Performance.

37. Effective Speed is the distance of the route divided by the average time it actually takes for Amtrak trains on the route to get from one endpoint to the other. To be deemed satisfactory, a route's Effective Speed must be equal to or better than the route's Effective Speed in 2007.

38. Endpoint On-Time Performance measures how often the trains on the route arrive on time at the endpoint terminal. A train on a short trip is deemed "late" if it arrives at its endpoint more than 10 minutes after its scheduled arrival time. A train on a longer trip is granted a tolerance of 30 minutes. To be deemed satisfactory, Endpoint OTP must be at least 80 percent (increasing to 85 and 90 percent in future years).

39. All-Stations On-Time Performance measures how often the trains on the route arrive on-time (within 15 minutes of the public timetables) at each station on the

route. To be deemed satisfactory, All-Stations OTP must be at least 80 percent (increasing to 85 and 90 percent in future years).

40. To satisfy the On-Time Performance metric, a route must maintain an Effective Speed equal to or better than the route's Effective Speed in 2007, and it must maintain an 80 percent Endpoint and All Stations On-Time Performance (increasing to 85 and 90 percent in future years). If a route fails any one of these three requirements, its performance is not deemed satisfactory and the host railroad may be subject to civil sanctions.

41. Historically, Amtrak has achieved 80 percent OTP on routes over 400 miles only twice since Amtrak was founded in 1971 and has achieved 80 percent OTP less than half the time on shorter trips.

Delay Minutes

42. The Metrics and Standards establish limits on the permissible minutes of delay attributable to the host railroads. Freight railroads are allowed no more than 900 minutes of host-responsible delays per 10,000 route miles. Delays are assessed on a route-by-route basis, and are calculated based on deviations from the route's "pure run time" (the fastest possible trip for an Amtrak train over a route, with no other traffic or delays). Thus, if the pure run time for a route is 1 hour, and a train completes the route in 1 hour 10 minutes, that is recorded as a 10-minute delay, even if the published schedule for the route identifies it as a 1 hour 10 minute trip.

43. The host railroad is not responsible for all delays. In cases where a third party or Amtrak itself is responsible for the delay, those delay minutes do not count toward the host railroad's limit. However, the Metrics and

Standards explain that the basis for determining who is at fault for a particular delay will be Amtrak's Conductor Delay Reports. These are reports prepared by the conductor of the delayed Amtrak train and are, according to Amtrak, based solely on what the conductor personally observes or assumes. In many cases, the conductor must complete the report and assign fault based on very limited information, *e.g.*, when the train is stopped for reasons unknown to the conductor. In other cases, the conductor may lack full understanding of the reason for a delay, *e.g.*, in a case where the host railroad directs the Amtrak train to stop in order to permit the Federal Railroad Administration to inspect the track, the conductor may not realize that the delay was prompted by the Government rather than the host railroad. Consequently, in many instances, the conductor misidentifies the true root cause of a delay.

E. FRA Determines The Metrics And Standards Are Not Being Met On Numerous Routes.

44. The Metrics and Standards became effective on May 11, 2010. In February 2011, the FRA issued its first quarterly report identifying the freight railroads' lines on which the Metrics and Standards are not being met. *See* Quarterly Report on the Performance and Service Quality of Intercity Passenger Train Operations. (All quarterly reports are available at www.fra.dot.gov/us/content/2165.) In a cover letter accompanying the report, the FRA Administrator stated that Amtrak has "provided the data necessary to populate this report." The report determined that the Metrics and Standards were not achieved on numerous routes during the July-September 2010 period.

45. The FRA issued its second quarterly report in April 2011. That report, which covers performance during the October-December 2010 period, reflects the same conclusion: the Metrics and Standards are not being met on numerous routes.

46. The FRA issued its third quarterly report in July 2011. This report covers performance during the January-March 2011 period. Like the two prior reports, it determines that the Metrics and Standards are not being achieved on numerous routes.

CLAIMS FOR RELIEF

CLAIM ONE: VIOLATION OF THE UNITED STATES CONSTITUTION (NONDELEGATION AND SEPARATION OF POWERS)

47. Plaintiff incorporates by reference the foregoing allegations.

48. The Constitution bars Congress from delegating to private parties the power to regulate the conduct of other private parties.

49. Amtrak "is not a department, agency, or instrumentality of the United States Government" but a private entity that is "operated and managed as a for-profit corporation." 49 U.S.C. § 24301(a).

50. Section 207 of PRIIA purports to vest Amtrak with legislative and rulemaking authority to issue regulations that govern the conduct of the freight railroads. Amtrak has now exercised that authority by promulgating the Metrics and Standards.

51. Section 207 of PRIIA violates the nondelegation doctrine and the separation of powers principle by placing legislative and rulemaking authority in the hands of a

private entity that participates in the very industry it is supposed to regulate.

CLAIM TWO: VIOLATION OF THE UNITED STATES CONSTITUTION (DUE PROCESS)

52. Plaintiff incorporates by reference the foregoing allegations.

53. Vesting the coercive power of the government in interested private parties violates the due process rights of regulated third parties, as secured by the Fifth Amendment to the United States Constitution.

54. Section 207 of PRIIA violates the due process rights of the freight railroads because it purports to empower Amtrak to wield legislative and rulemaking power to enhance its commercial position at the expense of other industry participants.

PRAYER FOR RELIEF

Wherefore, Plaintiff AAR respectfully requests that the Court issue an order:

(a) Declaring that Section 207 of PRIIA is unconstitutional;

(b) Vacating the Metrics and Standards;

(c) Declaring that any action previously taken by Defendants pursuant to Section 207 of PRIIA is null and void, including promulgating the Metrics and Standards;

(d) Enjoining Defendants and their officers, employees, and agents from implementing, applying, or taking any action whatsoever pursuant to Section 207 of PRIIA or the Metrics and Standards;

(e) Awarding Plaintiff its reasonable costs, including attorney's fees, incurred in bringing this action; and

(f) Granting such other and further relief as this Court deems just and proper.

Respectfully submitted,

/s/ THOMAS H. DUPREE, JR.
THOMAS H. DUPREE, JR.
(D.C. Bar No. 467195)
Porter Wilkinson
(D.C. Bar No. 1001123)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue NW
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(202) 955-8500

Louis P. Warchot
(D.C. Bar No. 465106)
Daniel Saphire
(D.C. Bar No. 358806)
ASSOCIATION OF AMERICAN RAILROADS
425 3rd Street, SW, Suite 1000
Washington, DC 20024
(202) 639-2503

Dated: August 19, 2011.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1:11-cv-01499 (JEB)
ASSOCIATION OF AMERICAN RAILROADS,
PLAINTIFF

v.

DEPARTMENT OF TRANSPORTATION, ET AL.,
DEFENDANTS

Nov. 30, 2011
[Filed: Dec. 2, 2011]

DECLARATION OF PAUL E. LADUE

I, PAUL E. LADUE, hereby declare and state as follows:

1. I am over 18 years of age. I have personal knowledge of the facts stated herein and, if called as a witness, could competently testify to the following.

2. I am Region Director Contracts and Administration for all of the U.S. rail operating affiliates of Canadian National Railway Company (collectively, CN). I have served in this position since October, 2003 and am responsible for negotiation, management, and administration of interline, joint facility, and operating agreements (including passenger rail). I have worked in a variety of

positions for various CN affiliates for approximately 33 years.

3. At present, 32 Amtrak trains operate daily over the lines of two of CN's U.S. rail operating affiliates, the Illinois Central Railroad Company and the Grand Trunk Western Railroad Company. These include 10 trains that run between Chicago Union Station (CUS) and Joliet, IL; four trains between CUS and Carbondale, IL; four trains between CUS and New Orleans, LA, via Memphis, TN, two trains between Pt. Huron, MI and Baron, MI, near Battle Creek, six trains between Pontiac, MI and Vinewood, MI, near Detroit, and six trains between Gord, MI and Baron. The number of Amtrak trains operating over CN lines has quadrupled since Amtrak's formation in 1971.

4. The CN tracks on which Amtrak operates its trains are used by CN for freight traffic and, in some areas, by other carriers for freight and passenger service. Hosting Amtrak trains—which under federal law must be given operating preference over freight trains—creates various operational and management challenges for CN. The operation of Amtrak trains on our tracks, combined with the need to give them dispatching priority, can limit our operating flexibility, impair the fluidity of our network, and generally prevent the optimal use of our infrastructure and network for serving our customers. These issues are exacerbated by the fact that Amtrak generally operates its passenger trains at higher speeds than CN's larger, heavier freight trains. As a result, CN often must provide Amtrak's trains larger "cushions" separating them from freight trains on the rail line, with the result that Amtrak's trains consume a disproportionate share of capacity or "train slots" on our lines.

5. CN's operating and management concerns have increased substantially with the adoption of the "Metrics and Standards" jointly issued by Amtrak and the Federal Railroad Administration (FRA) pursuant to section 207 of the Passenger Rail Investment and Improvement Act (PRIIA), which impose new performance measures and stringent new on-time performance goals for Amtrak trains. FRA's quarterly reports, which summarize the performance of Amtrak trains, indicate that the Metrics and Standards are frequently not being met for numerous Amtrak trains hosted by CN. For a variety of reasons, CN believes these findings are questionable. These include the fact that the data generated by Amtrak through their Conductor Delay Reports to measure compliance with the Metrics and Standards fail to reliably indicate the cause or responsibility for delays, and that this failure often results in the erroneous assignment of responsibility to the host railroads for events outside of their control. Nevertheless, CN must take very seriously any reported deficiencies in compliance with the Metrics and Standards because when Amtrak trains operating on CN-owned tracks repeatedly fail to satisfy the Metrics and Standards, CN is subject to a mandatory investigation by the Surface Transportation Board at the request of Amtrak or other parties, and such an investigation is a predicate to possible monetary penalties and other actions against CN.

6. The Metrics and Standards have consequently had and continue to have a direct and significant impact on CN. That impact is perhaps best illustrated by the fact that Amtrak has repeatedly (including as recently as June 24 and September 30, 2011) requested that CN provide to it in writing immediate actions CN will take to reduce host-responsible delays to bring all Amtrak trains

operating on CN into compliance with the Metrics and Standards. In light of that request, and CN's own concerns regarding its increased responsibilities and risks due to the Metrics and Standards, CN requested a meeting with Amtrak to discuss cooperative steps to improve Amtrak on-time performance as measured by the Metrics and Standards. In response to that request, a meeting was scheduled for August 19, 2011.

7. CN spent considerable time and effort preparing for its meeting with Amtrak. First, CN developed detailed proposals for nine capital improvement projects to address Amtrak's concerns about freight train interference at specific locations that Amtrak had identified and to ameliorate delays at those locations. In addition to schematic drawings, these proposals included high-level cost estimates for track and signal work, and descriptions of the benefits that could be anticipated as a result of the improvements.

8. Second, CN reviewed potential alternative means to address Amtrak's performance issues. CN reviewed the condition of the lines to determine if there were maintenance issues that could explain Amtrak's performance. (There were not.) In response to suggestions Amtrak had previously made that schedule changes might be used to improve Amtrak performance, CN developed a series of string line service design charts to identify any alternative time windows in which Amtrak trains could run with less risk of delay. Amtrak responded that they had little flexibility to depart from their current schedules.

9. Third, recognizing that data can play a useful role in identifying problems, trends, and progress in addressing Amtrak's operating issues, CN spent a great deal of

time and effort working to provide data concerning Amtrak's performance on CN's lines that is more accurate and realistic than the flawed data presented by Amtrak under the Metrics and Standards. Working with Amtrak's reports of host-responsible delays under the Metrics and Standards, CN conducted a thorough analysis that identified and, where possible, corrected errors and inaccuracies. CN then revised Amtrak's Metrics and Standards data to reflect these corrections. In addition, given the inherent deficiencies in the PRIIA data generated by Amtrak, particularly with respect to host-railroad performance, CN expended considerable time and resources generating its own more accurate data to measure performance based upon the contractual provisions of the Operating Agreement between CN and Amtrak, which establishes the terms and conditions, including service standards and compensation, governing the operation of Amtrak trains on CN's lines.

10. At the August 19 meeting, CN and Amtrak reviewed and discussed CN's analysis of specific capital improvement projects and alternatives that might improve Amtrak performance on CN's lines. CN also presented and discussed its analysis of Amtrak's data regarding host responsible delays, CN's own data concerning delays, and various suggestions to improve Amtrak's data and reporting under the Metrics and Standards. This data showed that Amtrak's performance on CN's lines had been steadily improving.

11. Notwithstanding these extensive efforts by CN to explore ways of improving Amtrak performance under the Metrics and Standards, as well as measurement of that performance, Amtrak has informed CN that it regards CN's efforts to date as inadequate and that even

more is required of CN in light of the Metrics and Standards. CN does not share Amtrak's apparent view that it is CN's unilateral responsibility to assure that Amtrak's trains meet all Metrics and Standards. Nonetheless, it is evident that CN will continue to face added burdens due to the heightened scrutiny and risks resulting from the adoption of the Metrics and Standards, particularly given Amtrak's insistence that its data demonstrates that Amtrak operations on CN's lines are failing to meet minimum performance requirements under them.

12. Finally, in addition to CN's ongoing efforts outlined above, CN also faces the significant upcoming task of modifying its existing Operating Agreement with Amtrak in order to comply with PRIIA. CN's Operating Agreement with Amtrak is an access and service agreement that establishes the terms and conditions governing the operation of Amtrak trains on CN's lines. Section 207(c) of PRIIA (entitled "Contracts With Host Rail Carriers") mandates that, "[t]o the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards . . . into their access and service agreements." As the Operating Agreement does not presently incorporate the Metrics and Standards, CN faces the difficult task of negotiating with Amtrak over potential amendments to comply with this PRIIA requirement.

13. The Metrics and Standards impose substantial, immediate, and continuing burdens on CN.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November [30], 2011, in Homewood, IL.

/s/ PAUL E. LADUE
PAUL E. LADUE
Region Director Contracts and Administration
CN
17641 South Ashland Avenue
Homewood, IL 60430-1345

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1:11-cv-01499 (JEB)
ASSOCIATION OF AMERICAN RAILROADS,
PLAINTIFF

v.

DEPARTMENT OF TRANSPORTATION, ET AL.,
DEFENDANTS

Dec. 1, 2011
[Filed: Dec. 2, 2011]

DECLARATION OF VIRGINIA MARIE BECK

I, Virginia Marie Beck, hereby declare and state as follows:

1. I am over 18 years of age. I have personal knowledge of the facts stated herein and, if called as a witness, could competently testify to the following.

2. I am Director Passenger and Joint Facility Agreements at CSX Transportation, Inc. ("CSXT"). I have served in this position since April 2009, and am responsible for negotiating and administering agreements between passenger agencies and other railroads on joint access and use of railroad assets. Prior to holding my current position, I held various positions at the railroad

including Manager Passenger Services, Conrail Integration Training Officer, Yardmaster, and Conductor.

3. Amtrak trains currently operate on approximately 3,322 miles of track owned by CSXT. Amtrak trains that are currently operating on CSXT-owned track include:

Adirondack Service: Poughkeepsie, NY – Schenectady, NY, 89 miles

Auto Train: Lorton, VA – Sanford, FL, 914 miles

Capitol Limited: Washington, DC – Field, PA, 297 miles

Cardinal: Washington, DC – Maynard, IN, 698 miles

Carolinian: Washington, DC – Selma, NC, 295 miles

Ethan Allen Express: Schenectady, NY – Poughkeepsie, NY, 89 miles

Hoosier State: Maynard, IN – Indianapolis, IN, 169 miles

Lake Shore Ltd (split service): Boston, MA – Albany, NY, 199 miles, then to Poughkeepsie, NY and Cleveland, OH, 543 miles

Maple Leaf: Poughkeepsie, NY – Niagara Falls, NY, 394 miles

New York: Poughkeepsie, NY – Albany, NY, 66 miles

Palmetto: Washington, DC – Savannah, GA, 604 miles

Pere Marquette: Porter, IN – Grand Rapids, MI, 135 miles

Richmond/Newport News: Washington, DC – Newport News VA, 189 miles

Washington, DC – Richmond, VA, 110 miles
Richmond, VA – Newport News, VA, 79 miles

[1]Silver Meteor: Washington, DC – Dyer, FL, 1088 miles

[2]Silver Star: Washington, DC – Dyer, FL, 1145 miles

Vermonter: Palmer, MA – Springfield, MA, 15 miles

4. The CSXT tracks on which the Amtrak trains operate are also used for freight traffic. The presence of passenger trains on freight lines necessarily has an impact on freight operations. Hosting Amtrak trains—which are given preference by federal law—presents many challenges to CSXT's ability to run an efficient and successful freight network. Passenger operations affect our ability to maximize the number of freight trains running on the network and to transport freight traffic to its destination in a timely manner. The presence of Amtrak trains on CSXT tracks, combined with the need to give them dispatching priority, limits the discretion our dispatchers have to maximize fluidity and capacity on the line.

5. Because of the relatively higher speeds of passenger trains, passenger trains consume a disproportionate share of the capacity or "train slots" available on a line causing greater delay to freight traffic and passenger trains.

6. The "Metrics and Standards" jointly issued by Amtrak and the FRA impose stringent performance

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[1] Excludes 64 miles between DeLand and Poinciana, Florida acquired by FDOT November 3, 2011

[2] Excludes 64 miles between Deland and Poinciana, Florida acquired by FDOT November 3, 2011

goals for Amtrak trains that cannot, as a practical matter, be achieved on many of CSXT's routes. For example, the Metrics and Standards establish an 80 percent on-time performance standard for Amtrak's Cardinal service, which operates over eight different host railroads with CSXT providing the greatest share of track miles. According to Amtrak reports, The Cardinal service achieved 80 percent on-time performance only once in the last five years and, in fact, is averaging less than 41 percent on-time performance over the same five-year period. Amtrak has expressed interest in increasing service on the Cardinal route from three days per week to seven days per week. CSXT as the primary host railroad is understandably cautious about entertaining this request, as additional service on the route increases the potential for penalties under the Metrics and Standards.

7. According to the Office of Inspector General's report OIG-A-2012-001 dated October 26, 2011, approximately half of short distance routes and approximately 25 percent of long distance routes are achieving 80 percent on-time performance.

8. I have reviewed the FRA's quarterly reports summarizing the performance of Amtrak trains on CSXT and understand thirteen (13) of CSXT's sixteen (16) routes are not meeting the 900 minutes of delay per 10,000 train mile standard required by Metrics and Standards.

9. While the Metrics and Standards seek to measure Amtrak's performance, they have had a direct and significant impact on many aspects of CSXT's operations. That is because when an Amtrak train operating on CSXT-owned track does not satisfy the Metrics and Standards, CSXT is subject to a mandatory government investigation at the request of Amtrak or other parties—

an investigation that is a predicate to possible monetary penalties against CSXT, as well as potentially subjecting CSXT to possible negative publicity and reputational harm.

10. As detailed below, CSXT is taking measures to avoid the possibility of investigations, fines, and reputational harm by allocating resources to evaluate the possibility of achieving the Metrics and Standards and identifying the effects of failure to achieve the Standards. Preliminary results indicate that efforts made by CSXT to achieve the Metrics and Standards will come at the expense of our freight traffic, which in many cases must be delayed. For this reason, the Metrics and Standards adversely affect our business by making it more difficult to serve our freight customers and to operate an efficient freight rail network.

11. As a result of the Metrics and Standards, CSXT is expending resources to evaluate changes required to achieve acceptable performance based upon Metrics and Standards, including the following:

(a) We have dismissed requests by commuter train operators to alter schedules affecting Amtrak trains, thereby delaying the efficient movement of commuter trains on our network.

(b) We have devoted increased internal resources and hired external consultants to investigate the accuracy of Amtrak's Conductor Delay Reports, which will apparently serve as the primary evidentiary basis for determining when a railroad is at fault for a particular delay.

(c) CSXT reorganized the Passenger Operations group to administer the mandated Maintenance of

Way curfew relief process required by Metrics and Standards. This action diverts resources away from daily train operations monitoring.

(d) We have engaged consultants to quantify the effects of the Metrics and Standards on our performance and to evaluate procedures for producing documentation and other support to defend against claims that CSXT failed to provide preference to Amtrak trains relative to Metrics and Standards.

(e) We have dedicated internal and external resources to evaluating infrastructure investments and/or operating plan changes necessary to meet Metrics and Standards and quantify the negative impact to freight customers and CSXT shareholders.

12. In a section entitled "Contracts With Host Rail Carriers," the Passenger Rail Investment and Improvement Act provides: "To the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards . . . into their access and service agreements." PRIIA, § 207(c).

13. CSXT has an access and service agreement—also known as an Operating Agreement—with Amtrak. This Operating Agreement establishes the terms and conditions governing the operation of Amtrak trains on tracks owned by CSXT. The current Operating Agreement was originally signed June 1, 1999, and has since been amended several times. The Operating Agreement and the amendments thereto were the subject of extensive negotiations and bargaining between Amtrak and CSXT.

14. CSXT believes realistic train schedules are a key element to successful passenger performance, as noted in Transportation Research Forum's "Improving On-Time

Performance for Long-Distance Passenger Trains Operating on Freight Routes" by Carl D. Martland published in the Journal of the Transportation Research Forum, Vol. 47, No. 4 (Fall 2008). The Metrics and Standards potentially restrict CSXT and Amtrak's ability to negotiate reasonable schedules under their private Operating Agreement.

15. First, the Metrics and Standards require a standard of 900 minutes of delay per 10,000 train miles, which is based upon Amtrak's definition of Pure Run Time. This standard is not necessarily reflected in contractually adopted schedules in the Operating Agreement. Second, the Metrics and Standards require year-over-year performance improvement. The parties' contractually agreed schedules do not contemplate this. Also, Amtrak publishes updated schedules to the public twice a year, and typically contacts CSXT to request schedule changes in advance of issuing updated schedules.

16. The Passenger Rail Investment and Improvement Act Section 214 creates an Alternative Passenger Rail Service Pilot Program that would allow one or more private railroads over which Amtrak operates to receive federal operating subsidies in return for assuming responsibility for the operation of up to two intercity passenger rail routes currently operated by Amtrak. Metrics and Standards have been made a condition of participation in FRA's Notice of Public Rulemaking Docket No. FRA-2009-0108; Notice 1. CSXT is prevented from participating in this program as the "Metrics and Standards" jointly issued by Amtrak and the FRA impose stringent performance goals for Amtrak trains that cannot, as a practical matter, be achieved on many of CSXT's routes. CSXT would also be prevented from allowing

other railroads interested in participating in the PRIIA program as we cannot knowingly grant trackage rights to third parties who commit to comply with Metrics and Standards as mandated by the rulemaking.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 1, 2011, in Jacksonville, Florida.

/s/ VIRGINIA MARIE BECK
VIRGINIA MARIE BECK
Director Passenger and Join
Facility Agreements
500 Water Street, J315
Jacksonville, FL 32202

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1:11-cv-01499 (JEB)
ASSOCIATION OF AMERICAN RAILROADS,
PLAINTIFF

v.

DEPARTMENT OF TRANSPORTATION, ET AL.,
DEFENDANTS

Nov. 30, 2011
[Filed: Dec. 2, 2011]

DECLARATION OF MARK M. OWENS

I, Mark M. Owens, hereby declare and state as follows:

1. I am over 18 years of age. I have personal knowledge of the facts stated herein and if called as a witness, could competently testify to the following.

2. I am Director Joint Facilities for Norfolk Southern Corporation. In this capacity I am the principal NS officer managing relations between Norfolk Southern and Amtrak and Norfolk Southern and other railroads utilizing joint facilities owned or operated by Norfolk Southern. Prior to this position, I was Manager of Passenger Operations for Norfolk Southern from 1999 to

2002. I started my railroad career at Penn Central in May of 1974.

3. Amtrak currently operates 7,850 trains annually on Norfolk Southern tracks. These Amtrak trains operate over 3,300 miles of Norfolk Southern's 20,000 mile route system covering 22 Eastern states and the District of Columbia. Among the more notable Amtrak passenger trains operating over a portion of Norfolk Southern are: the Crescent (Alexandria to New Orleans); the Capitol Limited (Pittsburgh to Chicago); the Pennsylvanian (Harrisburg to Pittsburgh); and the Lake Shore Limited (Cleveland to Chicago).

4. The Norfolk Southern tracks on which the Amtrak trains operate are also used for freight traffic. The presence of passenger trains on freight lines necessarily has an impact on freight operations. Hosting Amtrak trains —which are given preference by federal law—presents many challenges to our ability to run an efficient and successful freight network. Passenger operations affect our ability to maximize the number of freight trains running on the network and to transport freight traffic to its destination in a timely manner. The presence of Amtrak trains on our tracks, combined with the need to give them dispatching priority, limits the discretion our dispatchers have to maximize freight fluidity and capacity on the line.

5. In addition, passenger trains travel at higher speeds than freight trains and must be separated from freight operations for safety reasons. Because of the relatively higher speeds of passenger trains (maximum speed of 79 mph while freights have a maximum speed of 60 or 50 mph) and the safety need to separate passenger and freight traffic, passenger trains consume a disproportionate share of the capacity or "train slots" available

on a line. This impact is heightened by Norfolk Southern's decision to separate Amtrak trains from freight traffic by positive blocks. This results in greater separation of freight and passenger trains than exists between freight and other freight trains.

6. The "Metrics and Standards" jointly issued by Amtrak and the FRA impose stringent performance goals for Amtrak trains that are not being achieved on Norfolk Southern routes. For example, the Metrics and Standards establish an 80 percent on-time performance standard for Amtrak's Crescent, which operates on Norfolk Southern tracks. But Amtrak has never achieved an 80 percent on-time performance on that route, and in fact has averaged less than 60 percent on-time performance (under the Amtrak-NS Agreement) over the last three years.

7. I have reviewed the FRA's quarterly reports summarizing the performance of Amtrak trains, and understand that those reports indicate that the Metrics and Standards are currently not being met on over one-half of the routes hosted by Norfolk Southern. In fact, several Amtrak trains, among them the Wolverine, Blue Water, Pere Marquette (operating over Norfolk Southern's Michigan Line) and the Capitol Limited and Lake Shore Limited (operating over Norfolk Southern's Chicago Line) almost never meet the prescribed Amtrak metrics.

8. While the Metrics and Standards nominally measure Amtrak's performance, they have had a direct and significant impact on many aspects of Norfolk Southern's operations. That is because when an Amtrak train operating on Norfolk Southern-owned tracks does not satisfy the Metrics and Standards, Norfolk Southern is subject to a mandatory government investigation at the request

of Amtrak or other parties—an investigation that is a predicate to possible monetary penalties against Norfolk Southern.

9. As a result of the Metrics and Standards, Norfolk Southern has made operational changes, including the following:

(a) We have modified train schedules to accommodate Amtrak trains, thereby delaying the efficient movement of freight traffic on our network. This has been especially pronounced in North Carolina.

(b) We have devoted increased resources to investigating the accuracy of Amtrak's Conductor Delay Reports, which will apparently serve as the primary evidentiary basis for determining when a railroad is at fault for a particular delay. Shortly after initiation of the Metrics and Standards Norfolk Southern added a 24 hour desk, at NS' expense, to monitor performance. That has since been discontinued.

(c) Amtrak trains and their performance measures have impacted or will impact major planned capital improvements. One example is on a portion of the Crescent route, from Atlanta to New Orleans. Early in 2012 Norfolk Southern will undertake major track work, costing Norfolk Southern over one million dollars per day. Norfolk Southern has requested that Amtrak discontinue Trains 19 and 20 in Atlanta for the six to eight weeks duration of this project. If they are not agreeable, the presence of Amtrak trains during this period will severely impact the cost and completion date of this project.

10. As recently as last week, Amtrak used the Metrics and Standards to try to negotiate operational improve-

ments on Norfolk Southern's system. In an email dated November 22, 2011, Amtrak's Vice President Transportation, Richard Phelps, asked Norfolk Southern's Chief Operating Officer, Mark Manion, to consider implementing a performance improvement program for Amtrak trains operating over Norfolk Southern's Chicago Line. Mr. Phelps linked the purported need for operational and maintenance improvements to the Metrics and Standards, stating, "In particular we would review what worked, what didn't, and what our next steps would be, with an objective of identifying and implementing the steps required to bring all Amtrak services on the Chicago Line into compliance with the FRA standards. Such steps may include operational improvements, maintenance improvements, and potentially even capacity improvements for which our companies may jointly seek public funding." A complete copy of this email is attached to this Declaration as Exhibit A.

11. In a section entitled "Contracts With Host Rail Carriers," the Passenger Rail Investment and Improvement Act provides: "To the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards . . . into their access and service agreements." PRIIA, § 207(c).

12. Norfolk Southern has an access and service agreement—also known as the "Off-Corridor" Operating Agreement—with Amtrak. This Operating Agreement establishes the terms and conditions governing the operation of Amtrak trains on tracks owned by Norfolk Southern. The Operating Agreement was originally signed in 1979 and again in 1994 and has most recently been amended in February 2006. The Operating Agreement, and the amendments thereto, were the subject of

extensive negotiations and bargaining between Amtrak and Norfolk Southern.

13. Amtrak officials have told us that they expect us to begin incorporating the Metrics and Standards into the Operating Agreement pursuant to the statute, when that Agreement is next re-negotiated.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November [30], 2011, in Atlanta, Georgia.

/s/ MARK M. OWENS
MARK M. OWENS
Director Joint Facilities
Norfolk Southern Corporation
1200 Peachtree Street, N.E.
Atlanta, GA 30309

EXHIBIT A

From: "Phelps, Richard" <[address redacted]>

Date: November 22, 2011 3:54:44 PM EST

To: "Manion, Mark D." <[address redacted]>

Cc: "Geary, Jeffrey E" <[address redacted]>,
"Vilter, Paul" <[address redacted]>

Subject: NS/Amtrak OTP

Dear Mark,

Thanks once again for joining me for lunch in Washington back in June. It was great to see you.

An important item that we discussed was the performance of Amtrak trains on NS, in particular the recent increases in Freight Train Interference (FTI) delays on NS. We discussed NS adding FRA performance standards to its daily management reports, which NS implemented shortly after our meeting. I appreciate NS making this important improvement so promptly.

Since our meeting, NS has performed well on many routes. As shown in the first of the attached exhibits, during the most recent quarter Amtrak services operating on NS met the FRA standard for Host-Responsible Delays except for the Cardinal and the Amtrak services operating on the Chicago Line. During October the Crescent, Lynchburg, and North Carolina services, in particular, were among the best-performing services on the Amtrak system. Amtrak appreciates NS's continued attention to these services that are performing well on NS.

The Chicago Line services, however, are of significant concern to Amtrak. On the Capitol Limited and Lake Shore Limited, for example, FTI delays have increased by nearly 250% since 2009. In fact, Chicago Line FTI delays are increasing so rapidly that NS's system average FTI delays (second exhibit) continue to increase despite improvements on other routes. Severe FTI delays on the Chicago Line are in turn leading to substantial decreases in on-time performance. On the Lake Shore Limited, for example, On-Time Performance for the most recent quarter was only 37% measured at endpoint, and only 28% measured at all stations. It is critical that Amtrak and NS work together to reverse this trend as soon as possible.

I propose the following steps:

1. Near term: NS brief all Chicago Line management and dispatching staff regarding the importance of priority dispatching for Amtrak trains. NS has in the past demonstrated an impressive ability to improve performance very quickly, and as such I am confident that NS will be able to achieve a significant level of improvement on its own. I propose that NS implement this action within two weeks.

2. Medium term: NS and Amtrak revisit the joint Performance Improvement Program (PIP) for the Chicago Line that our companies pursued in 2008-2009. In particular we would review what worked, what didn't, and what our next steps would be, with an objective of identifying and implementing the steps required to bring all Amtrak services on the Chicago Line into compliance with the FRA standards. Such steps may include operational improvements, maintenance improvements, and potentially even capacity improvements for which our companies may jointly seek public funding. As you may recall, the main participants in a PIP are local NS and Amtrak Division management personnel. I propose that NS and Amtrak set a goal to have our respective teams identified by December 9, with a final action plan from the joint team no later than Spring 2012.

Please let me know if the above proposal will work for NS.

Sincerely,

Richard H. Phelps
Vice President - Transportation
15 South Poplar Street
Wilmington, DE 19801

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1:11-cv-01499 (JEB)
ASSOCIATION OF AMERICAN RAILROADS,
PLAINTIFF

v.

DEPARTMENT OF TRANSPORTATION, ET AL.,
DEFENDANTS

Nov. 30, 2011
[Filed: Dec. 2, 2011]

DECLARATION OF PEGGY HARRIS

I, Peggy Harris, hereby declare and state as follows:

1. I am over 18 years of age. I have personal knowledge of the facts stated herein and, if called as a witness, could competently testify to the following.

2. I am General Manager – Passenger Operations for Union Pacific Railroad. I have served in this position since April 1, 2011 and am responsible for executing and monitoring performance under UPRR's Operating Agreement with Amtrak. Prior to holding my current position, I held positions responsible for trackage rights billing and contract compliance, infrastructure capacity

planning, operational metrics development, and budgeting.

3. Amtrak trains currently operate on approximately 5900 miles of track owned by UPRR. Amtrak trains that are currently operated on UPRR-owned track include:

Long Distance Routes:

- Sunset Limited
- California Zephyr
- Coast Starlight
- Texas Eagle

Corridor Routes

- Lincoln
- Missouri
- San Joaquins
- Cascades
- Pacific Surfliner
- Capitol Corridor
- Cardinal/Hoosier

4. Most UPRR tracks on which the Amtrak trains operate are primarily used for freight traffic. The presence of passenger trains on freight lines necessarily has an impact on freight operations. Hosting Amtrak trains —which are given preference by federal law—presents many challenges to our ability to run an efficient and successful freight network. Passenger operations affect our ability to maximize the number of freight trains running on the network and to transport freight traffic to its

destination in a timely manner. The presence of Amtrak trains on our tracks, combined with the need to give them dispatching priority, limits the discretion our dispatchers have to maximize freight fluidity and capacity on the line.

5. In addition, passenger trains travel at higher speeds than freight trains and must be separated from freight operations for safety reasons. Because of the relatively higher speeds of passenger trains and the safety need to separate passenger and freight traffic and the need for freight trains to pull aside to allow faster Amtrak trains to pass, passenger trains consume a disproportionate share of the capacity or "train slots" available on a line.

6. The "Metrics and Standards" jointly issued by Amtrak and the FRA impose stringent performance goals for Amtrak trains that cannot, as a practical matter, be achieved or controlled on certain UPRR's routes. For example, the Texas Eagle arrives frequently late at the endpoints according to UPRR's records.

7. I have reviewed the FRA's quarterly reports summarizing the performance of Amtrak trains, and understand that those reports indicate that the Metrics and Standards are currently not being met on any long distance routes hosted by UPRR.

8. While the Metrics and Standards nominally measure Amtrak's performance, they have had a direct and significant impact on many aspects of UPRR's operations.

9. As detailed below, UPRR is taking measures which will increase the likelihood that Amtrak trains will be able to satisfy the Metrics and Standards. For exam-

ple, UPRR's Engineering Department has rescheduled maintenance to reduce the impact on Amtrak Trains. Sometimes engineering forces must start work earlier, work in split windows, or work at night so as not to impact Amtrak. In some instances, freight traffic is rerouted onto other lines so that Amtrak can maintain its normal route and schedule during engineering work. These measures necessarily come at the expense of our freight traffic, which in many cases must be delayed or removed.

10. As a result of the Metrics and Standards, we have had to devote increased resources to investigating the accuracy of Amtrak's Conductor Delay Reports, which will apparently serve as the primary evidentiary basis for determining when a railroad is at fault for a particular delay.

11. In a section entitled "Contracts With Host Rail Carriers," the Passenger Rail Investment and Improvement Act provides: "To the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards . . . into their access and service agreements." PRIIA, § 207(c).

12. UPRR has an access and service agreement—also known as an Operating Agreement—with Amtrak. This Operating Agreement establishes the terms and conditions governing the operation of Amtrak trains on tracks owned by UPRR. UPRR's various predecessor railroads had operating agreements dating back to the founding of Amtrak in 1971. The current Operating Agreement was originally signed on January 1, 2000, and has since been amended repeatedly. The Operating Agreement, and the amendments thereto, were the subject of extensive negotiations and bargaining between Amtrak and UPRR.

13. When the Metrics & Standards were published in the Federal Register on May 12, 2010, a senior Amtrak official emailed a copy of the new regulations to UPRR and stated, "These Metrics and Standards will have a big impact on UP and Amtrak."

14. Current UPRR Passenger Operations personnel do not have access to Amtrak's ARROW system to obtain real time or historical data relevant to the Metrics & Standards. Daily historical data sets provided separately by Amtrak do not contain sufficient detail to support root cause analysis where train performance falls short of standard. This makes it extremely difficult to identify, implement, or assess the effectiveness of corrective actions.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November [30], 2011, in Omaha, Nebraska.

/s/ PEGGY HARRIS
PEGGY HARRIS
General Manager – Passenger Operations
UNION PACIFIC RAILROAD COMPANY
1400 Douglas Street – Mail Stop 1580
Omaha, NE 68179

[LETTERHEAD OMITTED]

Jan. 19, 2011

Hand Delivered

Cynthia Brown
Chief, Section of Administration [231709]
Surface Transportation Board
Office of Proceedings
395 E. Street SW
Washington, DC 20423-0001

Re: In re National Rail Passenger Corporation,
Docket Number NOR 42134

[RECEIVED]
[JAN. 19, 2012]
[MANAGEMENT]
[STB]

Dear Ms. Brown:

WilmerHale represents the National Rail Passenger Corporation (Amtrak) in connection with its Petition for Relief by Amtrak Requiring the Initiation of an Investigation of Substandard Performance under Section 213 of the Passenger Rail Investment and Improvement Act of 2008.

This filing includes the original and ten hard copies of the petition, three CDs containing electronic copies of the petition, and the $250 filing fee. Please stamp one copy of this letter to indicate that all the documents have been

received and filed, and please return the stamped copy with my associate, Natalie Adams, for our files.

Thank you for your assistance in this matter. If you have any questions or concerns, please feel free to contact me.

Respectfully submitted.

/s/ DAVID W. OGDEN
DAVID W. OGDEN

[ENTERED]
[Office of Proceedings]
[JAN. 19, 2012]
[Part of Public Record]

[FILED]
[JAN. 19, 2012]
[SURFACE
TRANSPORTATION BOARD]

[FEE RECEIVED]
[JAN. 19, 2012]
[SURFACE
TRANSPORTATION BOARD]

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42134
IN RE NATIONAL RAILROAD PASSENGER CORPORATION:
SECTION 213 INVESTIGATION OF SUBSTANDARD
PERFORMANCE ON CANADIAN NATIONAL RAILWAY
COMPANY RAIL LINES

[Filed: Jan. 19, 2012 with the
Surface Transportation Board]
[Copy filed: Mar. 6, 2012 with the
United States District Court
for the District of Columbia]

PETITION FOR RELIEF BY AMTRAK REQUIRING THE INITIATION OF AN INVESTIGATION OF SUBSTANDARD PERFORMANCE UNDER SECTION 213 OF THE PASSENGER RAIL INVESTMENT AND IMPROVEMENT ACT OF 2008

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TRANSPORTATION BOARD]

[FILED]
[JAN. 19, 2012]
[SURFACE
TRANSPORTATION BOARD]

1. Pursuant to 49 C.F.R. § 1117.1, the National Railroad Passenger Corporation ("Amtrak") hereby submits this petition to initiate an investigation by the Surface Transportation Board ("STB" or "Board") of the substandard performance of Amtrak passenger trains on rail lines owned by Canadian National Railway Company and its subsidiaries, Grand Trunk Western Railroad Company and Illinois Central Railroad Company (collectively "CN"). Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA"), codified at 49 U.S.C. § 24308(f), "upon the filing of a complaint by Amtrak . . . the Board shall initiate [] an investigation" into the causes of delays incurred by Amtrak passenger trains operating over a rail carrier's lines.

2. Here, the excessive delays incurred by Amtrak passenger trains operating over rail lines owned by CN resulted in substandard on-time performance ("OTP") of Amtrak passenger trains in every quarter between October 2010 and September 2011 ("Fiscal Year 2011"). CN has engaged in a pattern and practice of obstructing and delaying Amtrak passenger trains in violation of its obligation to prioritize Amtrak trains over freight transportation under the preference requirement of 49 U.S.C.

§ 24308(c). CN has also failed to develop, implement, and/or comply with operational protocols that would significantly reduce delays to Amtrak passenger trains. Amtrak requests that, at the conclusion of the investigation, the STB so find, make recommendations to improve CN's deficient performance in handling Amtrak passenger trains, and award damages against CN sufficient to deter future preference violations.

I. PRELIMINARY STATEMENT

3. Amtrak's passenger service has long been hindered by the choices and actions of CN. The performance of Amtrak trains operating over CN's rail lines has consistently fallen short of both the standards developed pursuant to Section 207 of PRIIA and the performance of Amtrak trains on every other Class 1 host railroad in the country.

4. These performance deficiencies have been caused, in large part, by (1) CN's pattern and practice of prioritizing freight trains over Amtrak passenger trains, in violation of Amtrak's statutory preference rights and (2) CN's failure to implement and/or enforce operational procedures that would minimize delays to Amtrak passenger trains. Changes in CN's practices and operations would significantly improve Amtrak's on-time performance and reduce CN-responsible delays to Amtrak trains. But despite repeated reasonable requests from Amtrak, CN has failed to acknowledge its responsibilities to Amtrak and has refused to adopt measures necessary to satisfy the standards developed pursuant to Section 207.

* * * * *

VI. PRAYER FOR RELIEF

117. Amtrak respectfully requests that the STB initiate and conduct a comprehensive investigation into the causes of the substandard on-time performance and excessive delays experienced by Amtrak passenger trains operating over CN's rail lines, as it is required to do upon the filing of a complaint, pursuant to 49 U.S.C. § 24308(f)(1).

118. Amtrak submits that the recommendations for improvement should include, at least, that:

- CN cease engaging in a pattern and practice of failing to provide preference to Amtrak trains over freight transportation in violation of 49 U.S.C. § 24308(c);
- CN develop, implement, and/or comply with operational protocols that would reduce delays to Amtrak passenger trains that operate over CN's rail lines, so that on-time performance and delays on these trains comply with the Section 207 standards.

119. Amtrak further submits that the STB should find CN has engaged in a pattern and practice of routinely violating Amtrak's statutory right of preference, codified at 49 U.S.C. § 24308(c), and that the STB should award damages sufficient to deter future violations of the law by CN.

DATED: [January 19, 2012]

Respectfully submitted,

/s/ DAVID W. OGDEN
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Counsel for National Rail Passenger Corporation

PETITIONER'S BRIEF

No. 13-1080

In the Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

ASSOCIATION OF AMERICAN RAILROADS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Section 207(a) of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, Div. B, 122 Stat. 4916, requires that the Federal Railroad Administration (FRA) and Amtrak "jointly * * * develop" the metrics and standards for Amtrak's performance that will be used in part to determine whether the Surface Transportation Board (STB) will investigate a freight railroad for failing to provide the preference for Amtrak's passenger trains that is required by 49 U.S.C. 24308(c). In the event that the FRA and Amtrak cannot agree on the metrics and standards within 180 days, Section 207(d) of the Act provides for the STB to "appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." 122 Stat. 4917.

The question presented is whether Section 207 effects an unconstitutional delegation of legislative power to a private entity.

PARTIES TO THE PROCEEDING

The four petitioners were the appellees in the court of appeals: the United States Department of Transportation; Anthony Foxx, in his official capacity as Secretary of Transportation; the Federal Railroad Administration; and Joseph C. Szabo, in his official capacity as the Administrator of the Federal Railroad Administration.

The only appellant in the court of appeals was respondent Association of American Railroads.

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In the Supreme Court of the United States

No. 13-1080

DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

ASSOCIATION OF AMERICAN RAILROADS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 721 F.3d 666. The opinion of the district court (Pet. App. 24a-50a) is reported at 865 F. Supp. 2d 22.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2013. A petition for rehearing was denied on October 11, 2013 (Pet. App. 51a-52a). On December 31, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 7, 2014. On January 28, 2014, the Chief Justice further extended the time to March 10, 2014, and the petition was filed on that date. The petition was granted on June 23, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1 of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." Pertinent statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-22a.

STATEMENT

1. a. Before 1970, intercity passenger-railroad service in the United States had become unprofitable. *National R.R. Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 454 (1985). Nevertheless, railroads, as common carriers, were obligated to continue providing that service unless relieved of the obligation to do so by the Interstate Commerce Commission (ICC) or state regulatory authorities. *Ibid.* Despite railroads' general desires to terminate those services, Congress determined that "the public convenience and necessity require[d] the continuance and improvement" of passenger-rail service. Rail Passenger Service Act of 1970, Pub. L. No. 91-518, § 101, 84 Stat. 1328. It therefore established the National Railroad Passenger Corporation (known as Amtrak) to serve as the successor to those railroads abandoning passenger-rail service (*id.* §§ 301, 401(a), 84 Stat. 1330, 1334-1335), thereby "avert[ing] the threatened extinction of passenger trains in the United States." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 383 (1995).

As a condition of relieving railroads of passenger-rail-service obligations, Congress required, among other things, that they allow Amtrak to use their tracks and facilities, at rates either agreed to by Amtrak and the host railroads or prescribed by the

ICC or, later, the Surface Transportation Board (STB or Board). See 49 U.S.C. 24308(a); *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 410 (1992); *Atchison, Topeka & Santa Fe Ry.*, 470 U.S. at 455. To this day, outside the Northeast Corridor (which runs from Boston to Washington, D.C.), Amtrak's trains operate almost exclusively on infrastructure owned and dispatched by freight railroads.[1] Since 1973, Congress has granted Amtrak a general preference over freight transportation in using those facilities, specifying as follows:

> Except in an emergency, intercity and commuter rail passenger transportation provided by or for *Amtrak has preference over freight transportation in using a rail line, junction, or crossing* unless the Board orders otherwise under this subsection. A rail carrier affected by this subsection may apply to the Board for relief. If the Board, after an opportunity for a hearing under section 553 of title 5, decides that preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers, the Board shall establish the rights of the carrier and Amtrak on reasonable terms.

49 U.S.C. 24308(c) (emphasis added); see Amtrak Improvement Act of 1973, Pub. L. No. 93-146, § 10(2), 87 Stat. 552 (initial version).

b. Congress has declared that Amtrak is "not a department, agency, or instrumentality of the United

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[1] Office of Inspector Gen., Fed. R.R. Admin., CR-2012-148, *Analysis of the Causes of Amtrak Train Delays* 3 (July 10, 2012), www.oig.dot.gov/sites/dot/files/AMTRAK%20Delays%20Report%5E7-10-12.pdf.

States Government." 49 U.S.C. 24301(a)(3). "As initially conceived, Amtrak was to be 'a for profit corporation.'" *Lebron*, 513 U.S. at 384-385 (quoting § 301, 84 Stat. 1330). But Congress soon modified that language, stating—"less optimistically perhaps," *id.* at 385—that Amtrak "shall be operated and managed as a for-profit corporation," 49 U.S.C. 24301(a)(2). As the Committee responsible for recommending that change explained, the "amendment recognizes that Amtrak is not a for-profit corporation." H.R. Rep. No. 1182, 95th Cong., 2d Sess. 15 (1978) (*1978 House Report*). Since then, Congress has further specified that Amtrak's core "mission" is "to provide efficient and effective intercity passenger rail mobility" while using its business judgment to "minimize Government subsidies." 49 U.S.C. 24101(b) and (d).

Congress has further required Amtrak to pursue various other public objectives and has prescribed how Amtrak will conduct certain aspects of its operations. For instance, Amtrak must provide reduced fares for the disabled and the elderly. 49 U.S.C. 24307(a). It shall "ensure mobility in times of national disaster or other instances where other travel options are not adequately available" and "ensure equitable access to the Northeast Corridor by intercity and commuter rail passenger transportation." 49 U.S.C. 24101(c)(9) and (10). When it decides which improvements to make in the Northeast Corridor, Amtrak must apply seven "considerations," in a specified "order of priority," and the improvements must "produce the maximum labor benefit from hiring individuals presently unemployed." 49 U.S.C. 24902(b) and (c). Whenever Amtrak purchases at least $1 million of articles, materials, or supplies, they must be mined or produced in the Unit-

ed States, or manufactured substantially from components that are mined, produced, or manufactured in the United States, unless the Secretary of Transportation grants an exemption. 49 U.S.C. 24305(f). Congress has even prescribed the minimum average speed on which Amtrak's schedules should be based (60 miles per hour), and required it to develop a plan for restoring service on a particular route (from New Orleans to Sanford, Florida). See 49 U.S.C. 24101(c)(6); Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, Div. B, § 226, 122 Stat. 4934.

In addition to providing such instructions, Congress has subjected Amtrak to governmental oversight and control through a variety of mechanisms, including the appointment of eight of Amtrak's nine directors by the President with the advice and consent of the Senate (with the ninth director, the President of Amtrak, being appointed by the other eight). 49 U.S.C. 24302(a)(1), 24303(a). And Congress has continually appropriated substantial federal funds to ensure Amtrak's continued operations—more than $30 billion from fiscal year 1971 to 2006, and between $1.3 and $1.5 billion in each of the last eight fiscal years.[2]

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[2] See Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, Div. L, Tit. I, 128 Stat. 591-592; Amtrak, *Fiscal Year 2013 Budget and Comprehensive Business Plan: Operating, Capital Programs and Debt Service Expense Budget* 11-12 (May 2013), www.amtrak.com/ccurl/345/484/AmtrakFY13-Budget-Comprehensive-Business-Plan-w-appx-052413.pdf; Amtrak, *Fiscal Year 2011 Revised Budget and Comprehensive Business Plan: Operating, Capital Programs and Debt Service Expense Budget* 6 (Mar. 2010), www.amtrak.com/ccurl/724/689/AmtrakFY11RevisedBudgetandComprehensiveBusinessPlan.pdf; U.S. Gov't Accountability Office, GAO-07-15, *Intercity Passenger Rail: National Policy and Strat-*

c. Over the decades, Congress has enacted several statutes aimed at improving Amtrak's service and encouraging its long-term viability.[3] This case concerns its most recent effort: the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), *supra*. In the wake of a determination by the Department of Transportation's Inspector General that Amtrak could have saved "almost one-third of its operating budget" if it had "achieved an 85 percent on-time performance outside the Northeast Corridor," PRIIA sought, among other things, to alleviate the "poor service reliability and on-time performance" that resulted from "freight traffic congestion." H.R. Rep. No. 690, 110th Cong., 2d Sess. 36 (2008) (*2008 House Report*). As relevant here, that effort involved three inter-related sets of provisions.

First, Section 207(a) of PRIIA provided that, within 180 days of its October 2008 enactment,

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egies Needed to Maximize Public Benefits from Federal Expenditures 11 (Nov. 2006).

[3] See, *e.g.*, Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 548; Amtrak Improvement Act of 1974, Pub. L. No. 93-496, 88 Stat. 1526; Amtrak Improvement Act of 1975, Pub. L. No. 94-25, 89 Stat. 90; Amtrak Improvement Act of 1976, Pub. L. No. 94-555, Tit. I, 90 Stat. 2613; Amtrak Improvement Act of 1978, Pub. L. No. 95-421, 92 Stat. 923; Amtrak Reorganization Act of 1979, Pub. L. No. 96-73, Tit. I, 93 Stat. 537; Amtrak Improvement Act of 1981, Pub. L. No. 97-35, Tit. XI, Subtit. F, 95 Stat. 687; Amtrak Reauthorization Act of 1985, Pub. L. No. 99-272, Tit. IV, Subtit. A, 100 Stat. 106; Amtrak Reauthorization and Improvement Act of 1990, Pub. L. No 101-322, 104 Stat. 295; Amtrak Authorization and Development Act, Pub. L. No. 102-533, 106 Stat. 3515 (1992); Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, 111 Stat. 2570.

> the *Federal Railroad Administration and Amtrak shall jointly*, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, *develop new or improve existing metrics and minimum standards for measuring the performance and service quality* of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services.

49 U.S.C. 24101 note (emphasis added). Section 207(d) further provided that, if the metrics and standards were not completed within 180 days, "any party involved in the development of those standards [could] petition the [STB] to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." *Ibid.*

Second, Congress specified that, once the metrics and standards had been developed, Amtrak would use them for various purposes, including annual evaluations of its performance, the development of performance improvement plans for long-distance routes, and the development and implementation of a plan to improve on-board service. 49 U.S.C. 24710(a)-(b); 49 U.S.C. 24101 note (PRIIA § 222).[4] Congress similarly

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[4] With respect to the long-distance routes, Congress took care to specify that Amtrak had to focus first on improving the "worst performing" routes, and then the "second best performing" routes, and finally the "best performing routes," 49 U.S.C. 24710(c), without regard to whether it could get a better return on investment by improving a better-performing route first.

provided that the Federal Railroad Administration (FRA) would "publish a quarterly report on the performance and service quality of intercity passenger train operations" addressing the specific elements to be measured by the metrics and standards. 49 U.S.C. 24101 note (PRIIA § 207(b)). And Congress further provided that, "[t]o the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards * * * into their access and service agreements," *ibid.* (PRIIA § 207(c)).

Third, PRIIA authorized the STB to "adjudicat[e]" disputes between Amtrak and the freight railroads, including disputes about when Amtrak's "on-time performance problems" stem from the freight railroads' failure to "provide preference to Amtrak over freight trains." S. Rep. No. 67, 110th Cong., 1st Sess. 25-26 (2007) (*2007 Senate Report*). PRIIA therefore provided as follows:

> If the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters, or the service quality of intercity passenger train operations for which minimum standards are established under section 207 of [PRIIA] fails to meet those standards for 2 consecutive calendar quarters, the Surface Transportation Board * * * may initiate an investigation * * * to determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators.

49 U.S.C. 24308(f)(1). Alternatively, PRIIA provided that the STB "shall initiate such an investigation" "upon the filing of a complaint by Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service." *Ibid.*

In such an investigation, the Board may "review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays." 49 U.S.C. 24308(f)(1). In making its determination, the Board "shall obtain information from all parties involved and identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train." *Ibid.* Following the investigation, the Board may choose to "award damages" or other appropriate relief against a host railroad if it determines that Amtrak's substandard performance is attributable to the "rail carrier's failure to provide preference to Amtrak over freight transportation as required" by the pre-existing preference provision in 49 U.S.C. 24308(c). 49 U.S.C. 24308(f)(2). If the Board deems it appropriate for damages to be remitted to Amtrak, then Amtrak must use them "for capital or operating expenditures on the routes over which delays" were the result of the host railroad's failure to grant the statutorily required preference to passenger transportation. 49 U.S.C. 24308(f)(4).

2. In March 2009, the FRA and Amtrak, acting pursuant to Section 207(a) of PRIIA, jointly developed a draft version of the metrics and standards, J.A. 11-74, and published a notice in the *Federal Register* seeking comments from the various stakeholders identified in the statute, including freight railroads, J.A.

75-76. After receiving and considering comments, the FRA and Amtrak developed the final version of the metrics and standards, which was issued in May 2010. J.A. 129-144. Some of the metrics involve Amtrak's financial performance, for which the associated standard is that there be "[c]ontinuous year-over-year improvement on a moving eight-quarter average basis." J.A. 130-131. The on-time-performance metrics apply to the ends of each route as well as (at a later date) to all station stops. J.A. 132-135; see 49 U.S.C. 24101(c)(4) (calling for "station stops within 15 minutes of the time established in public timetables"). The standards associated with those metrics require on-time performance, at least 80% to 95% of the time for each route, depending on the route and year. J.A. 133-135. The standards associated with train delays specify a maximum number of "minutes [of delay] per 10,000 Train-Miles," ranging from 265 to 900. J.A. 136-140. Other metrics and standards involve minimum customer-satisfaction rates in surveys, J.A. 141-142, and some metrics (*e.g.*, the percentage of passengers connecting to or from other routes, or the percentage of passenger trips to or from underserved communities) have no associated standards, J.A. 143-144.

3. In August 2011, respondent—an association representing large freight railroads that own tracks on which Amtrak operates—commenced this suit against petitioners in the United States District Court for the District of Columbia. J.A. 5, 161-178; Pet. App. 30a-31a. Respondent advanced two claims. First, it contended that "Section 207 of PRIIA violates the nondelegation doctrine and the separation of powers principle by placing legislative and rulemaking authority in

the hands of a private entity [Amtrak] that participates in the very industry it is supposed to regulate." J.A. 176-177 (Compl. ¶ 51). Second, respondent contended that Section 207 violates the Fifth Amendment's Due Process Clause by "[v]esting the coercive power of the government" in Amtrak, an "interested private part[y]" given the ability to "enhance its commercial position at the expense of other industry participants." J.A. 177 (Compl. ¶¶ 53-54).

In addition to a declaration of Section 207's unconstitutionality, respondent sought vacatur of the Amtrak-performance metrics and standards, the issuance of an injunction against any action by the Department of Transportation or the FRA pursuant to the metrics and standards or Section 207, a declaration that any such actions previously taken are null and void, and an award of "reasonable costs, including attorney's fees." J.A. 177-178.

The district court granted summary judgment in favor of petitioners. Pet. App. 24a-50a. The court noted that both of respondent's claims for relief depended on the premise that Amtrak is a private rather than governmental entity. *Id.* at 34a. With respect to respondent's due-process claim, the court determined that, under this Court's decision in *Lebron*, "Amtrak is the government in the context of claims that invoke the Constitution's guarantees of individual rights." *Id.* at 42a. Accordingly, it held that Section 207 does not impermissibly vest "regulatory authority" in an "interested private part[y]." *Id.* at 35a.

With respect to respondent's nondelegation claim, the district court held that "[e]ven if Amtrak is a private entity, as [respondent] contends, the government retains ultimate control over the promulgation of the

[m]etrics and [s]tandards," and Section 207 therefore "passes constitutional muster." Pet. App. 43a-44a. The court emphasized that "Amtrak could not have promulgated [the metrics and standards] without the FRA's approval" and that "the STB also retains control over their enforcement." *Id.* at 46a. Moreover, the court concluded that, "even if the involvement of these agencies is not enough to ensure the constitutionality of [Section] 207's delegation, the government retains structural control over Amtrak itself." *Ibid.* The court concluded that "[t]aken together, the involvement of the FRA in promulgating the regulations, the role of the STB in their enforcement, and the government's structural control over Amtrak itself more than suffice" to render the statute constitutional. *Id.* at 49a.

4. The court of appeals reversed, Pet. App. 1a-23a, holding that Section 207 "constitutes an unlawful delegation of regulatory power to a private entity," *id.* at 3a.

The court of appeals acknowledged that Section 207 bears a "passing resemblance" to statutory frameworks this Court sustained against delegation challenges in *Currin* v. *Wallace*, 306 U.S. 1 (1939), and *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940). Pet. App. 9a. It also acknowledged that "no court has invalidated a scheme like [Section] 207's." *Id.* at 12a. But it concluded that "[n]o case prefigures" what it considered to be the "unprecedented regulatory powers delegated to Amtrak." *Id.* at 10a.

Despite the FRA's role in devising and approving the Amtrak-performance metrics and standards, the court of appeals noted that the FRA was "impotent to choose its [own] version without Amtrak's permission." Pet. App. 10a. The court found further cause for con-

cern in the provision requiring that any impasse regarding the development of the metrics and standards be resolved by having the STB "appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." *Id.* at 14a (quoting 49 U.S.C. 24101 note (PRIIA § 207(d)). The court rejected the government's suggestion that the statute's reference to "an arbitrator" could be construed, if necessary to avoid serious constitutional concerns, as authorizing the Board to appoint only a governmental official as the arbitrator. *Id.* at 15a n.7.

The court of appeals recognized that "the metrics and standards themselves impose no liability" on freight railroads. It nevertheless concluded that Amtrak's ability to participate in their approval reflects the kind of power that cannot be delegated to a private entity because they "lend definite regulatory force to an otherwise broad statutory mandate." Pet. App. 11a, 12a. The court therefore concluded that, "[u]nless it can be established that Amtrak is an organ of the government, * * * [Section] 207 is an unconstitutional delegation of regulatory power to a private party." *Id.* at 16a.

The court of appeals recognized that "[m]any of the details of Amtrak's makeup support the government's position that it is not a private entity of the sort described in" *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), the last case in which this Court invalidated an Act of Congress under the nondelegation doctrine. Pet. App. 16a. But the court of appeals found significant Congress's declarations that "Amtrak 'shall be operated and managed as a for-profit corporation' and 'is not a department, agency, or instrumentality of the

United States Government.'" *Id.* at 17a (quoting 49 U.S.C. 24301(a)(2) and (3)).

As a result, the court concluded that Section 207 does not adequately serve what it saw as the "functional purposes" for distinguishing between public and private entities "when it comes to delegating regulatory power." Pet. App. 18a. In particular, the court held that allowing Amtrak to play a role in drafting the metrics and standards for evaluating Amtrak's own performance and service quality fails to serve two such purposes. First, it does not promote "democratic accountability," because Congress has denominated Amtrak a "for-profit corporation" rather than a "department, agency, or instrumentality of the United States Government." *Ibid.* (citations omitted). Second, it does not promote "the public good," because, the court believed, "[n]othing about the government's involvement in Amtrak's operations restrains the corporation from devising metrics and standards that inure to its own financial benefit rather than the common good." *Id.* at 19a, 20a.

Accordingly, the court of appeals held that, "as a private entity, Amtrak cannot be granted the regulatory power prescribed in [Section] 207." Pet. App. 23a. Having invalidated Section 207 on the basis of respondent's nondelegation claim, the court found it unnecessary to reach the due-process claim. *Ibid.*

SUMMARY OF ARGUMENT

Congress has constitutional authority to permit private entities to play a role in the development, and even the approval, of regulatory provisions. Amtrak, moreover, should not be considered a private entity for purposes of constitutional nondelegation principles. The court of appeals therefore erred in holding that

Section 207 of PRIIA effected an unconstitutional delegation of legislative power to a private entity.

A. The government retained sufficient control over both the development and the future application of the metrics and standards to avoid any nondelegation concerns.

1. Section 207 required the active participation and independent assent of the FRA, and included additional procedural protections, such as consultation with stakeholders like respondent. Those factors thoroughly differentiate Section 207 from the scheme held unconstitutional in *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 283-284, 310-312 (1936), in which binding labor standards were devised and approved entirely by private entities without any governmental involvement in their creation or approval. The court of appeals nevertheless believed that Section 207 allowed Amtrak to exercise "unprecedented regulatory powers" because the FRA would have been "impotent to choose its [own] version" of the metrics and standards "without Amtrak's permission." Pet. App. 10a. That is incorrect. This Court has approved statutory schemes under which provisions that would bind various market participants—and favor some more than others—would not become effective unless they were approved by a sufficient, but non-unanimous, portion of the affected industry. See *Currin* v. *Wallace*, 306 U.S. 1, 15-16 (1939); *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, 547-548, 577-578 (1939).

2. The court of appeals further erred in concluding that Section 207(d) of PRIIA compounded the threat of private control over the process of developing the metrics and standards because it provided that any impasse could be resolved by an arbitrator appointed

by the Surface Transportation Board, and Section 207(d) did not affirmatively forbid "the appointment of a private party as arbitrator." Pet. App. 14a-15a. Congress, which knows how to provide for private arbitrators, did not do so here, and several statutes (including PRIIA) contemplate that other disputes involving Amtrak would be resolved by the STB rather than a private entity. If the arbitration provision were actually thought to exacerbate a constitutional threat, the canon of constitutional avoidance would require it to be construed as permitting appointment only of a governmental arbitrator, thus eliminating the hypothetical possibility that Amtrak could combine with a private arbitrator to dominate the development of the metrics and standards.

3. In any event, the metrics and standards impose no binding regulatory requirements on freight railroads. Although the metrics and standards play a role in triggering certain investigations by the STB, private entities commonly, and unobjectionably, have the power to initiate a government enforcement proceeding. Once an STB investigation begins under 49 U.S.C. 24308(f), the Board will gather evidence from all parties, and any sanction will not be based on any violation of the metrics and standards but rather on a determination that the host railroad violated its statutory obligation to provide a preference for passenger-rail transportation.

B. Assuming *arguendo* that the nature of the Amtrak-performance metrics and standards would preclude a private entity's participation in their development, Amtrak is not merely a private corporation for nondelegation purposes.

1. While Congress may exempt—and indeed has exempted—Amtrak from many statutory obligations that apply to governmental entities, the Court has previously determined that Congress cannot prevent Amtrak from being deemed governmental "for the purpose of individual rights guaranteed against the Government by the Constitution." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 394 (1995). The extent of Congress's latitude under nondelegation principles is a question involving structural constitutional limits, and is therefore not controlled by Congress's statements that Amtrak is not a governmental agency. See *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) (applying *Lebron* in the context of an Appointments Clause and separation-of-powers challenge).

2. Treating Amtrak as a private entity for nondelegation purposes cannot be squared with Amtrak's statutorily prescribed mission and goals, which are legion and often not conducive to profitability. The federal government also exercises extensive control over Amtrak's management, by virtue of many oversight provisions as well as the President's direct appointment, with the Senate's advice and consent, of eight of the nine members of its Board of Directors, who then appoint, and have the power to remove, the ninth member, the President of Amtrak. And Amtrak routinely receives significant federal funding (totaling more than $41 billion in its first 43 years).

Those multiple mechanisms for control easily outweigh Congress's declaration that Amtrak "shall be operated and managed as a for-profit corporation." 49 U.S.C. 24301(a)(2). Indeed, Congress has long recognized that Amtrak is not in fact profitable, and it has

merely sought to reduce Amtrak's need for federal subsidies. The court of appeals' belief that an overarching profit motive would cause Amtrak to serve "private interests" rather than the "the common good" (Pet. App. 20a, 23a) is particularly incongruous, because the owner of the overwhelming majority of Amtrak's stock (*i.e.*, the one who would reap any profits) is the federal government, not a private person.

ARGUMENT

The court of appeals held unconstitutional a key component of Congress's most recent effort to improve intercity passenger-rail service in the United States by providing for the establishment of metrics and standards for evaluating Amtrak's performance and service quality. Although the court of appeals believed that Section 207 resulted in an "unprecedented" delegation of power to a private entity, Pet. App. 10a, this Court's decisions have, in fact, sustained the constitutionality of Acts of Congress under which certain regulatory provisions could not take effect without the approval of private entities. In any event, even if private entities were entirely precluded from playing any role in the development or approval of regulatory provisions, the metrics and standards do not impose any such regulatory requirements. Moreover, Amtrak should not be considered a private entity for purposes of the nondelegation doctrine, in light of the federal government's extensive control over Amtrak's mission and goals, its management, and a substantial portion of its funding.

A. The Government Retained Sufficient Control Over The Development And Application Of The Amtrak-Performance Metrics And Standards To Avoid Non-delegation Concerns

Nondelegation challenges often involve questions about whether Congress has supplied an "intelligible principle" for the responsible decision-maker to apply. *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928); see also *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). Respondent does not contend that Section 207 of PRIIA lacks intelligible principles to guide the FRA and Amtrak, and it does not challenge the provision on that basis.

Instead, respondent contends that Section 207 is unconstitutional because it permits Amtrak to act jointly with the FRA in developing the metrics and standards that are to be used to judge Amtrak's own performance and help identify which routes need what kinds of improvements. In respondent's view, the nondelegation doctrine prevents Congress from allowing a private entity to serve "more than a 'ministerial' or 'advisory' role in the exercise of Government power." Br. in Opp. 13-14; see *id.* at 26 (asserting that this Court's precedents "prohibit delegations to private companies, period"). But, assuming *arguendo* that Amtrak should be deemed a private entity for purposes of nondelegation analysis, the role Congress assigned to Amtrak still presents no nondelegation concerns because governmental entities had sufficient control over the development and adoption of the metrics and standards in the first instance. Those governmental entities also have sufficient control over any enforcement actions against the freight railroads rep-

resented by respondent, which would be predicated on an independent and unchallenged statutory mandate.

1. Congress may condition the effectiveness of regulatory provisions on the involvement or approval of private entities

a. It has been nearly 80 years since this Court invalidated an Act of Congress on the ground that it delegated too much authority to a private party. In *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), the Court struck down a statute that required all coal producers to accept the maximum labor hours and minimum wages negotiated by the producers of more than two-thirds of the annual coal tonnage and representatives of more than half of the mine workers. *Id.* at 283-284, 310-312. In that case, the government had no involvement in the creation or approval of the binding labor provisions, which were instead devised and approved entirely by private entities, and then deemed to be "accepted" by all code members in the relevant district or districts. *Id.* at 284.[5]

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[5] The Court had previously held, in *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), that the National Industrial Recovery Act, ch. 90, 48 Stat. 195, which had authorized the President to approve "codes of fair competition" developed and submitted by industry groups, had effected "an unconstitutional delegation of legislative power." 295 U.S. at 542, 552. But that holding rested to a significant extent on the "virtually unfettered" nature of the delegation to the President, rather than just the involvement of private parties. *Id.* at 542; see *id.* at 538-539. Before that, the Court had sustained statutes authorizing private parties to make determinations with legally binding consequences. See, *e.g.*, *St. Louis, Iron Mountain & S. Ry.* v. *Taylor*, 210 U.S. 281, 286-287 (1908) (rejecting challenge to Act of Mar. 2, 1893, ch. 196, §§ 5-6, 27 Stat. 531-532, which authorized a private railway association to establish standard heights for drawbars on railroad

After *Carter Coal*, however, the Court sustained the validity of statutes that permitted private parties to play a significant role in formulating or imposing new regulatory provisions. In doing so, it recognized that "[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality" in fashioning statutory schemes involving private parties. *Currin* v. *Wallace*, 306 U.S. 1, 15 (1939) (citation omitted); see also *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940); *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939).

b. The court of appeals believed that Section 207 of PRIIA delegated "unprecedented regulatory powers" to Amtrak because the requirement for joint development meant that if the FRA had "prefer[red] an alternative to Amtrak's proposed metrics and standards," it would have been "impotent to choose its [own] version without Amtrak's permission." Pet. App. 10a. This Court, however, has approved statutory schemes under which particular standards were subject to private parties' veto powers.

In *Currin*, *supra*, the statute provided that new federal inspection and certification standards could not be applied to a tobacco market designated by the Secretary of Agriculture "unless" their application was

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cars used in interstate commerce, and subjected railroads to monetary penalties for failure to comply with the height requirement); *Jackson* v. *Roby*, 109 U.S. 440, 441-442 (1883) (sustaining Act of July 26, 1866, ch. 262, § 1, 14 Stat. 251, which provided that "the mineral lands of the public domain" are "subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States").

approved by "two thirds of the [tobacco] growers [in that market], voting at a prescribed referendum." 306 U.S. at 6. The Court acknowledged that such a scheme "placed a restriction upon [the government's] own regulation" but rejected the contention that it constituted an impermissible "delegation of legislative authority." *Id.* at 15-16. The Court upheld a similar statutory scheme in *Rock Royal Co-operative*, *supra*, which, in relevant part, prevented an order governing minimum milk prices paid by milk handlers to milk producers from becoming effective unless it was approved by two-thirds of the producers in the relevant marketing area. 307 U.S. at 547-548. The Court again held that, as long as Congress had the power to put the order into effect "without the approval of anyone," then the "requirement of [the private producers'] approval would not be an invalid delegation." *Id.* at 577-578.

The court of appeals sought to distinguish *Currin* on the ground that it involved "the collective participation of two thirds of industry members" rather than "a statute that favored a single firm over all its market rivals." Pet. App. 10a n.4. But the standards or prices at issue in *Currin* (as well as in *Rock Royal Co-operative*) would indisputably favor or disfavor some market participants *vis-à-vis* others. And it would make no sense to forbid Congress from requiring an agency to secure the consent of one party (as under PRIIA Section 207), and yet permit Congress to require the same agency to secure the consent of many such parties (as in *Currin* and *Rock Royal Co-operative*). Here, it was entirely reasonable for Congress to provide a distinct role for Amtrak—among the others who needed only to be consulted—because the

metrics and standards were intended to assess Amtrak's own performance and because Amtrak is the instrument through which Congress sought to advance the public interest in passenger-rail service when freight railroads were released from that aspect of their common-carrier obligations.[6]

c. Taking a slightly different tack than the court of appeals, respondent has attempted to distinguish *Currin* and *Rock Royal Co-operative* as merely giving private parties "the ability to *opt out* of the exercise of coercive state power" without being "given the ability to *wield* coercive state power over their business competitors." Br. in Opp. 17. That distinction also fails. In each case, the regulatory provisions or prices to which an industry super-majority agreed had precisely the effect of binding other market participants who had not consented. In *Rock Royal Co-operative*, "[v]igorous campaigns were waged by both proponents and opponents of the [Secretary of Agriculture's proposed] Order," which provided "[c]ompetitive advantages to co-operatives." 307 U.S. at 556-557. When less than half of the affected milk handlers agreed to the Secretary's price order, the order was nevertheless allowed to go into effect because three-quarters

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[6] Other courts of appeals have rejected nondelegation challenges to statutes that vested private parties with authority to disapprove regulatory standards. See *Kentucky Div., Horsemen's Benevolent & Protective Ass'n* v. *Turfway Park Racing Ass'n*, 20 F.3d 1406, 1416 (6th Cir. 1994) (challenge to federal statute giving racehorse owners veto power over racetrack's plan to permit interstate off-track betting); *Sequoia Orange Co.* v. *Yeutter*, 973 F.2d 752, 759 (9th Cir. 1992) (challenge to Secretary of Agriculture's determination to implement amendments to orange marketing order only with approval of 75% of growers (or those growing two-thirds of total crop)), amended by 985 F.2d 1419 (9th Cir. 1993).

(*i.e.*, more than the requisite two-thirds) of the affected milk producers had "approved its terms." *Id.* at 559, 577. In other words, some private actors were able to decide what prices would apply (even to their competitors), and dissenting producers and handlers were powerless to opt out.

Similarly, in *Currin*, some North Carolina tobacco growers desired to sell at a local market that was subject to a federal inspection-and-certification regime, while others did not; and the warehousemen in the markets that were subject to the federal regime "compet[ed] for patronage among the same growers" with the warehousemen in other markets in the State that were exempt from that regime. 306 U.S. at 8-9, 13, 19.

There is therefore no basis for respondent's suggestion (Br. in Opp. 15) that Amtrak is the first entity that has effectively been authorized to exercise a veto power over a federal standard that could affect other market participants.[7]

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[7] As respondent has conceded, Amtrak is not a direct competitor with the freight railroads for customers. See Br. in Opp. 15 ("Amtrak may not compete with the freight railroads for customers, but it does compete with them for use of their scarce track.") (quoting Pet. App. 19a). Amtrak assumed the passenger-service obligations that other railroads were permitted to abandon; in furtherance of the public's interest in preserving a national system of intercity passenger-rail transportation, the freight railroads are now bound to allow Amtrak to use their facilities at rates either agreed to by Amtrak and the host railroads or prescribed by the STB. See 49 U.S.C. 24308(a); *National R.R. Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 453-456 (1985). Accordingly, Amtrak's position *vis-à-vis* a host railroad is not akin to a market competitor, but rather to a customer of a common carrier that cannot refuse to furnish a service to the customer at the approved rate, or to the holder of an easement of necessity who may have to coordinate the exercise of his privilege to use the

d. This Court has also recognized that private parties may play a role in the development of proposed regulatory standards. In *Sunshine Anthracite Coal, supra*, for instance, the Court upheld a statutory framework authorizing groups of coal producers to propose prices for coal that were then subject to approval, disapproval, or modification by the National Bituminous Coal Commission (a governmental entity). 310 U.S. at 387-388 & n.2, 399.

Thus, to the extent that Amtrak is considered a private entity, Section 207 of PRIIA broke no new ground in allowing it to play a role in developing the Amtrak-performance metrics and standards. Unlike the wage and hour requirements in *Carter Coal*, the metrics and standards could not take effect without both the active participation and the independent assent of a governmental entity (the FRA). See *Carter Coal*, 298 U.S. at 284 (quoting statute providing only that private wage agreement "shall be filed with the Labor Board and shall be accepted as the minimum wages * * * by the code members operating in such district"). Moreover, the FRA and Amtrak were obliged to act "in consultation with" various stakeholders other than Amtrak, including freight railroads. 49 U.S.C. 24101 note (PRIIA § 207(a)). Invoking the statute's consultation provision, respondent, several of its freight-railroad members, and others provided comments in response to the *Federal Register* notice about the proposed metrics and standards. See, *e.g.*, C.A. App. 153-192 (reprinting several comment letters). In response to the comments, the final metrics and standards reflect-

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right-of-way with the owner of the servient estate who must also use the same physical space.

ed revisions that made them more favorable to the freight railroads than the original proposals.[8]

In light of those procedures and the active participation of the Executive Branch, Amtrak had no more involvement in the standards' development than did the coal producers in *Sunshine Anthracite Coal*. And the requirement that Amtrak agree to the standards (*i.e.*, its "veto" power over the FRA) was consistent with *Currin* and *Rock Royal Co-operative*. The court of appeals therefore erred in concluding that a private party is categorically precluded from playing anything more than an advisory role in the development of a standard and that such a standard cannot be conditioned upon a private party's approval.[9]

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[8] For instance, the final version increased the amount of "Host-Responsible Delays" outside the Northeast Corridor from 700 minutes per 10,000 Train-Miles, as proposed, to 900 minutes, and created a mechanism that would permit Amtrak and host railroads to adjust published timetables and delay allowances to accommodate major planned construction and maintenance. J.A. 100-101, 145-147. The final version also postponed the implementation of the new standard measuring on-time performance at all stations (rather than just the end of each route). J.A. 115.

[9] Other courts of appeals have upheld statutes that authorize private parties to take regulatory action subject to the approval of a governmental agency. See *Sorrell* v. *SEC*, 679 F.2d 1323, 1325 (9th Cir. 1982) (rejecting nondelegation challenge to statute allowing private self-regulatory organizations to develop rules for, and to conduct, disciplinary proceedings concerning their members, subject to SEC review and approval); *First Jersey Secs., Inc.* v. *Bergen*, 605 F.2d 690, 697 (3d Cir. 1979) (same), cert. denied, 444 U.S. 1074 (1980); *R.H. Johnson & Co.* v. *SEC*, 198 F.2d 690, 695 (2d Cir.) (same), cert. denied, 344 U.S. 855 (1952).

2. By providing for a government-appointed arbitrator to resolve disputes, Congress ensured that governmental entities would have the last word about the development of the metrics and standards

Even assuming that it would generally be impermissible for a governmental entity (the FRA) and a purportedly private entity (Amtrak) to have "equal" authority with respect to the development and adoption of the metrics and standards (Pet. App. 10a), the court of appeals seriously misconstrued the effect and significance of Section 207(d) of PRIIA. Section 207(d) provided that, if there were an impasse in promulgating the metrics and standards, *any* party involved in their development could "petition the [STB] to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." 49 U.S.C. 24101 note. In other words, Amtrak was ultimately not an equal partner with the FRA. Rather, the government always retained the upper hand by virtue of the reserved authority of a *government-appointed* arbitrator.

The court of appeals believed that the statute's arbitration provision (which was never invoked) compounded the delegation problem it perceived because that provision did not expressly forbid "the appointment of a private party as arbitrator." Pet. App. 14a-15a. But that conclusion runs counter to normal principles of statutory construction for two reasons. First, Congress is, in the absence of "an affirmative showing," presumed not to have authorized "subdelegations to outside parties." *United States Telecom Ass'n* v. *FCC*, 359 F.3d 554, 565 (D.C. Cir.), cert. denied, 543 U.S. 925 (2004). Second, elsewhere in the same Act that included PRIIA, Congress demonstrated that it

knew how to prescribe the use of a more elaborate (and traditional) procedure for selecting an arbitrator. See 49 U.S.C. 24405(d)(1), (2)(A), and (2)(B) (providing that, if employment-related disputes arise when a new entity replaces "intercity rail passenger service that was provided by Amtrak," then "the parties shall select an arbitrator" or alternately strike names from a list of arbitrators provided by the National Mediation Board). By contrast, in Section 207(d), Congress simply vested the power to choose the arbitrator in the STB (an adjudicatory agency of the government) without making any provision for private nomination of potential arbitrators or for the parties to select the arbitrator. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally.") (citation omitted).

PRIIA and other statutes already contemplate that other disputes involving Amtrak would be resolved by the STB rather than a private entity. See, *e.g.*, 49 U.S.C. 24308(a)(2)(A) (STB resolution of disputes about terms and compensation for Amtrak's use of other railroads' facilities and services); 49 U.S.C. 24308(f)(2) (STB resolution of disputes about passenger transportation's "preference" over freight transportation); see *2007 Senate Report* 26 ("The intent of [Section 24308(f)] is to provide a forum for both Amtrak and the freight railroads for the adjudication of service disputes, including on-time performance problems. * * * The Committee believes that STB will be able to consider disputes in an efficient and evenhanded manner."). Accordingly, the court of appeals' facile expectation that the Board-appointed

arbitrator would be a private party is especially anomalous.

If the court of appeals' constitutional concerns had been valid, then principles of constitutional avoidance would have counseled strongly in favor of reading the provision as contemplating a governmental, rather than private, arbitrator. See generally *Boos* v. *Barry*, 485 U.S. 312, 330-331 (1988) ("It is well settled that federal courts have the power to adopt narrowing constructions of federal legislation. Indeed, the federal courts have the duty to avoid constitutional difficulties by doing so if such a construction is fairly possible.") (citations omitted). Nondelegation concerns can support such an avoidance-based construction. See *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 342 (1974); *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion). Such a construction merely needs to be a "plausible interpretation[]" of the text. *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005). In *The Abby Dodge*, 223 U.S. 166 (1912), for example, the Court invoked constitutional concerns to construe a reference to "the waters of the Gulf of Mexico or Straits of Florida" as applying only to the portions of those waters "outside of the territorial limits of a State." *Id.* at 173, 177. Here, there is nothing in the text of PRIIA Section 207(d) that prevents its reference to an "arbitrator" appointed by the STB from being limited to a governmental arbitrator, thus eliminating even the hypothetical possibility (Pet. App. 15a) that private parties could combine to dominate the process of developing the metrics and standards.

3. *Any sanction against a freight railroad must be based on a determination by the Surface Transportation Board that the railroad failed to satisfy an independent statutory obligation, not the metrics and standards*

The court of appeals also failed to take account of the limited role the Amtrak-performance metrics and standards actually play with respect to the legal obligations of entities other than Amtrak. The metrics and standards serve primarily as tools to measure Amtrak's own performance, not to alter freight railroads' legal rights or obligations. See *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 475 (2001) ("It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.").

The court of appeals nonetheless believed that the metrics and standards effectively impose binding regulatory requirements on freight railroads, Pet. App. 11a-12a, 16a, concluding that "the metrics and standards lend definite regulatory force to an otherwise broad statutory mandate," *id.* at 12a. The court noted, for example, that respondent's members claimed they had been "forced" by the metrics and standards to take certain "immediate actions." *Id.* at 11a n.6. But that misconceives the way in which any truly regulatory consequences would be brought to bear on the freight railroads.

a. There was perhaps some incentivizing effect associated with the metrics and standards before the court of appeals struck them down. In the 21 months after they were finalized, Amtrak's on-time performance climbed to its highest point ever: In February 2012, its end-point, on-time-performance rate was

88.7% system-wide—and 81.2% on its long-distance routes (on which the rate had been below 30% in 2006).[10] After the court of appeals' July 2013 decision, however, Amtrak "saw an immediate drop in on-time performance across the board," which it believed "was directly attributable to train handling by the host carriers."[11] By June 2014, the system-wide rate had fallen to 69.7%, and the rate for long-distance routes was only 41.2%—barely half of what it had been 28 months earlier.[12]

Nevertheless, the freight railroads' concrete reasons to facilitate Amtrak's traffic would not have stemmed from the metrics and standards themselves, which have no direct regulatory effect on the host railroads. The railroads' actions would instead have been the product of the interaction of two other statutory provisions that present no nondelegation con-

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[10] See Amtrak, *Monthly Performance Report for February 2012*, at E-7 (rev. Sept. 14, 2012), www.amtrak.com/ccurl/395/557/Amtrak-Monthly-Performance-Report-February-2012,0.pdf; D.J. Stadtler, Vice President of Operations, Amtrak, *Testimony before the Surface Transportation Board* 3, 6 (Apr. 10, 2014), www.amtrak.com/ccurl/899/180/Amtrak-VP%20Operations-Stadtler-STB-Apr-09-2014.pdf (*Stadtler Testimony*).

[11] *Stadtler Testimony* 3; see also Joseph C. Szabo, Administrator, FRA, *Prepared Oral Testimony for Surface Transportation Board Hearing: U.S. Rail Service Issues, Docket EP 724*, at 2 (Apr. 10, 2014), www.fra.dot.gov/Elib/Document/3634 ("Over the past twelve months, we have witnessed a steady decline in timeliness of Amtrak trains, particularly those that operate over the freight rail network."); *id.* at 3 ("For February 2014, * * * delays attributable to the host freight railroad were the highest in over 5 years.").

[12] See Amtrak, *Monthly Performance Report for June 2014*, at E-7 (July 31, 2014), www.amtrak.com/ccurl/621/650/Amtrak-Monthly-Performance-Report-June-2014.pdf.

cerns: 49 U.S.C. 24308(c), which generally mandates that Amtrak's passenger-rail transportation "has preference over freight transportation in using a rail line, junction, or crossing"; and 49 U.S.C. 24308(f), which authorizes the STB to investigate Amtrak's delays and award damages or other relief only if it finds that a host railroad failed to provide the mandated preference.

The metrics and standards play a comparatively minimal role in that enforcement scheme. They simply provide standardized ways to collect data about Amtrak's performance. When "the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters, or the service quality of intercity passenger train operations for which minimum standards are established under section 207 of the [PRIIA] fails to meet those standards for 2 consecutive calendar quarters," that can trigger an "investigation" by the STB (either in the STB's discretion or at the request of Amtrak or a host railroad). 49 U.S.C. 24308(f)(1). But federal law often permits a private party to prompt the government to initiate an investigation. For example, under the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, a private citizen may petition to have a species listed, thereby triggering consideration by the Department of the Interior or the Department of Commerce. See 16 U.S.C. 1533(b)(3). And, under the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, a private individual may file a complaint with the Department of Housing and Urban Development alleging a discriminatory housing practice, thereby causing it to "make an investigation of the alleged discriminatory housing practice and complete such investigation within 100 days

* * * unless it is impracticable to do so." 42 U.S.C. 3610(a)(1)(B)(iv). As this Court has explained more generally with respect to the ability of private parties to choose whether or not to initiate a government enforcement proceeding, "[a]n otherwise valid regulation is not rendered invalid simply because those whom the regulation is designed to safeguard may elect to forego its protection." *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978).

The unexceptional nature of the process at issue here is underscored by Section 24308(f)(1)'s choice of terminology. Except when the STB acts *sua sponte*, its investigation begins "upon the filing of a complaint by Amtrak" or "a host freight railroad," 49 U.S.C. 24308(f)(1), and the STB then "adjudicat[es]" the complaint, 49 U.S.C. 24308 note (PRIIA § 213(b)); see also *2007 Senate Report* 26 (describing the proceeding as "a forum for both Amtrak and the freight railroads for the adjudication of service disputes, including on-time performance problems"). That conception—under which a governmental agency (like the STB) adjudicates a complaint by one entity about whether another entity has fulfilled its statutory obligations—has never been considered an unconstitutional delegation of power to the complaining private entity.

In fact, in *National Railroad Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407 (1992), the Court rejected the suggestion that Congress had delegated eminent-domain power to a private entity by authorizing Amtrak to initiate a condemnation proceeding before the ICC in which there would be a statutory presumption that Amtrak had a "need" for the property at issue, which could be overcome only if the ICC made certain findings. *Id.* at 410-411, 421. The Court

recognized that "the statute creates a presumption in favor of conveyance to Amtrak," but it did not create a private power of eminent domain because the ICC itself was still required to "assess the impact of any condemnation and make a determination as to just compensation." *Id.* at 421.

Accordingly, constitutional nondelegation principles do not prevent the metrics and standards from playing a role in specifying when Amtrak—or, for that matter, a host freight railroad, 49 U.S.C. 24308(f)(1)—can demand an STB investigation.

b. In any event, once the STB begins an investigation under Section 24308(f), the metrics and standards will be neither its focus nor the basis for any resulting sanction. The question under Subsection (f)(1) will be "whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a [host railroad] or reasonably addressed by Amtrak." 49 U.S.C. 24308(f)(1). And then the question, under Subsection (f)(2), with respect to any sanctions, will be whether the delays or failures "are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation." 49 U.S.C. 24308(f)(2).

In the course of making those determinations, the STB will "obtain information from *all parties* involved" and have the "authority to *review the accuracy* of the train performance data and the extent to which scheduling and congestion contribute to delays." 49 U.S.C. 24308(f)(1) (emphases added).[13] Respondent therefore

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[13] The STB has stated that, when Amtrak files a petition under Section 24308(f)(1), the proceeding is to "be adjudicated using the established procedures governing complaints and the encompassing discovery and motion practice guidelines set forth in" 49

errs in two respects when it asserts (Br. in Opp. 16) that Amtrak "creates and supplies the evidence that will be used to determine responsibility for violations of the rules it drafted." First, a host railroad may submit its own evidence about what caused delays on its lines, and the STB may conclude that the host railroad's information is more accurate than Amtrak's in terms of explaining the cause of a delay. See J.A. 182-183, 190, 197, 205 (declarations submitted by respondent describing collection of data by freight railroads to rebut the accuracy of Amtrak's Conductor Delay Reports in future STB proceedings). Second, the Board is not determining responsibility for "violations" of any standards developed by Amtrak (and the FRA). Rather, the *only* sanctionable violation will be of the preference requirement, which was written by Congress, not Amtrak. See 49 U.S.C. 24308(f)(2) (permitting damages only if delays or other failures are "attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation as required" by the statute). To the extent that the STB otherwise "identif[ies] reasonable measures * * * to improve the service, quality, and on-time performance of the train," it is empowered only to make nonbinding "recommendations." 49 U.S.C. 24308(f)(1).[14]

C.F.R. Parts 1112 and 1114, and that those procedures will provide both Amtrak and the freight railroad "ample opportunity to shape the evidence, suggest certain findings, and argue for or against damages and their scope." *In re National R.R. Passenger Corp.–Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat'l Ry. Co.*, Docket No. NOR 42134, at 3 (S.T.B. Jan. 2, 2013), www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/DB156C8056FC046585257AE800544598/$file/42405.pdf.

[14] Although Section 24308(f)(1) contains nothing requiring the STB to defer to the metrics and standards in the course of its

In other words, even when the metrics and standards have not been satisfied, a host railroad will face liability only if a governmental entity (the STB) determines, after its independent review of evidence submitted by all sides, that the host railroad failed to comply with the longstanding statutory-preference requirement, which is independent of the metrics and standards.

c. Finally, the fact that Congress directed Amtrak to seek to incorporate the metrics and standards into its contracts with host railroads does not transform the metrics and standards into something with actual regulatory effect. The metrics and standards do not supplant the operating agreements. Section 207(c) only provides for incorporation of the metrics and standards "[t]o the extent *practicable*," 49 U.S.C. 24101 note (emphasis added), and there is no statutory penalty for a failure to do so. The operating agreements remain individual contracts that are subject to the give-and-take of bargaining between Amtrak and the freight railroads. To the extent that Amtrak and a host railroad cannot agree on new terms in the wake of the metrics and standards, then the STB shall—as it has been able to do since it took over this function from the ICC in 1996, see 49 U.S.C. 702—"prescribe reasonable terms and compensation." 49 U.S.C.

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investigation, a contrary rule would not present a nondelegation concern. See, *e.g.*, 15 U.S.C. 2056a(b)(1)(B) (authorizing the Consumer Product Safety Commission to promulgate certain safety standards that "are substantially the same" as "voluntary consumer product safety standards"); *Safety Standard for Infant Bath Seats: Final Rule*, 75 Fed. Reg. 31,691, 31,691 (June 4, 2010) (rule adopting a safety standard that was "substantially the same as a voluntary standard developed by the American Society for Testing and Materials").

4308(a)(2)(A)(ii). Thus, it will be the Board, not Amrak, that determines what terms are reasonable if a ost railroad and Amtrak do not agree.

Under these circumstances, Amtrak's role in develping the standards intended to measure (and enable nprovements in) its own performance is not at all nalogous to the "scenario" conjured by the court of ppeals, "in which Congress has given to General Mo-ors the power to coauthor, alongside the Department f Transportation, regulations that will govern all utomobile manufacturers." Pet. App. 1a. Amtrak's upposed "competitive advantage" (Br. in Opp. 16) ver the freight railroads ultimately inheres in Con-ress's own prescription that Amtrak's passenger ervice be given preference—which respondent does ot challenge—and not in the performance standards ointly developed by the FRA and Amtrak. The court f appeals erred in concluding that Section 207 of 'RIIA fails to satisfy constitutional nondelegation oncerns, even if Amtrak is deemed to be a private ntity for these purposes.[15]

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[15] To the extent that the metrics and standards actually embodied final determination of "rights or obligations" or were an action from which legal consequences will flow," then the FRA's in-olvement in their promulgation would render them final agency ction subject to judicial review under the Administrative Proce-ure Act (APA) for arbitrariness. *Bennett* v. *Spear*, 520 U.S. 154, 77-178 (1997) (quoting *Port of Boston Marine Terminal Ass'n* v. *'ederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970); 5 U.S.C. 04. When respondent filed a version of this suit as a petition for eview in the court of appeals, it expressed its intention to chal-nge not only the constitutionality of Section 207 of PRIIA, but lso whether the metrics and standards were "a product of arbi-ary and capricious decision making in violation of the Adminis-ative Procedure Act." Statement of Issues to be Raised of Peti-

B. Amtrak Should Not Be Considered A "Private" Entity For Purposes Of Nondelegation Analysis

Assuming *arguendo* that the nature of the Amtrak-performance metrics and standards, even when combined with the FRA's involvement in their promulgation and the STB's exclusive enforcement role, would preclude a private entity's participation in their development, the court of appeals still erred because Amtrak is not merely "a private corporation" for purposes of nondelegation analysis. Pet. App. 16a. The court of appeals' contrary conclusion is inconsistent with *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), and with the multiple statutory provisions establishing federal control over Amtrak's mission and goals, its management, and a substantial portion of its funding.

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tioner Association of American Railroads 2, *Association of Am. R.R.* v. *Department of Transp.*, No. 10-1154 (D.C. Cir. Aug. 9, 2010). But after that proceeding was dismissed for want of jurisdiction (Order, *Association of Am. R.R.* v. *Department of Transp.*, No. 10-1154 (D.C. Cir. Nov. 24, 2010)), respondent pursued this parallel suit in district court without raising any APA claim.

If the STB ever orders a freight railroad to pay damages to Amtrak for failing to provide the statutorily required preference, that order would be subject to APA challenge and would provide a mechanism for judicial review of the metrics and standards if they, rather than the statutory preference, were somehow the basis of the decision. That constitutes another procedural safeguard associated with the Amtrak-performance metrics and standards that was absent in *Carter Coal*. See p. 20, *supra*.

1. Congress's undoubted power to exempt Amtrak from federal statutory obligations does not affect its governmental status for constitutional nondelegation purposes

In *Lebron*, this Court considered whether Amtrak should, despite its "nominal[]" status as "a private corporation," be "regarded as a Government entity for First Amendment purposes." 513 U.S. at 383. The Court held that Amtrak "is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." *Id.* at 394. As the Court explained, Congress's characterizations of Amtrak are "assuredly dispositive of Amtrak's status as a Government [or non-Government] entity for purposes of matters that are within Congress's control—for example, whether it is subject to statutes." *Id.* at 392. Congress has, for instance, specified that Amtrak is subject to the Freedom of Information Act, 5 U.S.C. 552, in any year in which it "receives a Federal subsidy." 49 U.S.C. 24301(e). And Amtrak has an Inspector General pursuant to the Inspector General Act of 1978, 5 U.S.C. App. 2.[16] On the other hand, Congress has removed Amtrak altogether from the Government Corporation Control Act, 31 U.S.C. 9101 *et seq.* See Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, Tit. IV, § 415(d)(2), 111 Stat. 2590. It has expressly exempted Amtrak from all of title 31 of the United States Code. See 49 U.S.C. 24301(a)(3). And it has

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[16] Amtrak is defined as a "designated Federal entity" for purposes of the Inspector General Act—the same category that includes, *inter alia*, the EEOC, the FCC, the National Archives and Records Administration, the National Security Agency, and the SEC. See § 8G(a)(2), 5 U.S.C. App. 2, at 521-522.

treated Amtrak as part of the private sector for purposes of the Unfunded Mandate Reform Act of 1995, 2 U.S.C. 1501 *et seq.* See, *e.g.*, *2007 Senate Report* 18; *2008 House Report* 52-53.

The latitude permitted to Congress under nondelegation principles, however, is not defined by statute. Here, the court of appeals recognized that respondent's nondelegation challenge presents "a constitutional question, not a statutory one." Pet. App. 21a. It nevertheless attempted to distinguish the holding of *Lebron*—that Amtrak is a governmental agency or instrumentality for the purpose of individual rights guaranteed by the Constitution—from the context of nondelegation analysis, which it described as presenting a question about "the federal government's structural powers under the Constitution." *Id.* at 22a. In the court of appeals' view, under *Lebron*, Amtrak should be subject to the Constitution's "'affirmative prohibitions' on government action," which do not extend to the nondelegation doctrine because that doctrine merely "defines the limits of what Congress *can* do," "rather than proscribing what Congress *cannot* do." *Id.* at 22a-23a (citation omitted).

The court of appeals' distinction between "the First Amendment" and "the federal government's structural powers" (Pet. App. 22a) cannot be reconciled with this Court's repeated recognition that the structural provisions of the Constitution serve not only to allocate powers among various organs of government but also to protect individual liberty. See, *e.g.*, *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2559 (2014) ("We recognize, of course, that the separation of powers can serve to safeguard individual liberty."); *id.* at 2592 (Scalia, J., concurring in the judgment) ("[T]he Constitution's

core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights."); *Bond* v. *United States*, 131 S. Ct. 2355, 2365 (2011) ("The structural principles secured by the separation of powers protect the individual as well."); *Bowsher* v. *Synar*, 478 U.S. 714, 722 (1986) ("[C]hecks and balances were the foundation of a structure of government that would protect liberty."); *INS* v. *Chadha*, 462 U.S. 919, 946-950, 959 (1983).

The court of appeals' reasoning is also inconsistent with *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010), which relied on *Lebron* when it considered Appointments Clause and separation-of-powers challenges to statutory limitations on the removal of members of the Public Company Accounting Oversight Board (PCAOB). *Id.* at 3151-3164. Like Amtrak, the PCAOB is "a Government-created, Government-appointed entity," *id.* at 3147, but Congress has specified that the PCAOB "shall not be an agency or establishment of the United States Government" and that none of the PCAOB's members, employees, or agents "shall be deemed to be an officer or employee of or agent for the Federal Government," 15 U.S.C. 7211(b). Nevertheless, the Court's opinion in *Free Enterprise Fund* invoked *Lebron* in support of the proposition, uncontested by the parties, that "the [PCAOB] is 'part of the Government' for constitutional purposes." 130 S. Ct. at 3148 (quoting *Lebron*, 513 U.S. at 397).

2. *The federal government's controls over Amtrak's mission, goals, and management, as well as much of its funding, prevent it from being deemed "private" for nondelegation purposes*

Even aside from this Court's prior cases, the court of appeals' view of Amtrak as a private entity for nondelegation purposes cannot be squared with Amtrak's statutorily prescribed mission and goals, the federal government's control over its management, and its significant federal funding. The court of appeals principally relied (Pet. App. 17a, 18a) on Congress's declarations that Amtrak "is not a department, agency, or instrumentality of the United States Government" and that it is to "be operated and managed as a for-profit corporation." 49 U.S.C. 24301(a)(2) and (3). In doing so, however, the court minimized a host of ties between Amtrak and the federal government demonstrating that Amtrak should not be considered a private entity for these purposes.

a. Not least, "Amtrak was created by a special statute, explicitly for the furtherance of federal governmental goals." *Lebron*, 513 U.S. at 397. From the outset, Amtrak's principal purpose has been to prevent the extinction of intercity passenger-rail transportation in the name of "the *public* convenience and necessity." Rail Passenger Service Act of 1970, Pub. L. No. 91-518, § 101, 84 Stat. 1328 (emphasis added); see also 49 U.S.C. 24101(a)(1). But Congress did not just charter Amtrak and unleash it to make money by providing passenger-rail service. Instead, as described above, Congress has continually modified and refined its instructions for Amtrak—identifying a welter of subsidiary public objectives, from reducing unemployment, to promoting equitable access, to purchasing

materials and supplies that are mined, produced, and manufactured in the United States. Congress has even specified various ways in which Amtrak must go about attempting to accomplish its statutorily defined tasks. See pp. 4-5, 7 n.4, *supra*.

In light of those multifarious statutory commands, the court of appeals was mistaken in treating Congress's declaration that Amtrak "shall be operated and managed as a for-profit corporation" (49 U.S.C. 24301(a)(2)) as the equivalent of an overarching directive to "seek profit on behalf of private interests," in light of a presumed "fiduciary duty to maximize company profits" on behalf of Amtrak's shareholders. Pet. App. 19a, 23a; see also Br. in Opp. 22 ("Amtrak's directors have a fiduciary duty to maximize corporate profits.").

In Amtrak's case, moreover, there is no equivalence between "for-profit" status and the promotion of "private interests." Private parties own only a small fraction of Amtrak's stock; the overwhelming majority is held by the Secretary of the Transportation "for the benefit of the Federal Government." C.A. App. 350.[17] Congress is also well aware that any expectations

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[17] The Secretary holds all of the preferred stock in Amtrak—109.4 million shares, each one of which "is convertible into 10 shares of common stock at the option of the preferred stockholder." C.A. App. 350. There are 9.4 million shares of common stock in private hands, acquired "from four railroads whose intercity rail passenger operations Amtrak assumed in 1971." *Id.* at 351. In 1997, Congress instructed Amtrak to redeem all of the common stock by 2002. See Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, Tit. IV, § 415(b), 111 Stat. 2590. That has not yet occurred and is the subject of ongoing litigation. See C.A. App. 351; *American Premier Underwriters, Inc.* v. *National R.R. Passenger Corp.*, 709 F.3d 584 (6th Cir. 2013).

of actual profits have long been, and are currently, unrealistic. See *2008 House Report* 33 ("There have been unrealistic expectations that Amtrak should be self-sufficient and profitable."); *2007 Senate Report* 2, 3 (noting that the "expectation of Amtrak's self-sufficiency, and even profitability," held in 1971 "has proven to be * * * unrealistic," and that Amtrak's unwillingness "to exit services perceived as essential to *its public mission* led to the failure to dramatically reduce [its] reliance on Federal operating subsidies") (emphasis added); *1978 House Report* 15 (explaining that "Amtrak is not a for-profit corporation"). Indeed, the statutory text shows that Amtrak's efforts to "maximize its revenues" are not for the purpose of serving private interests but for "minimiz[ing] the need for Federal operating subsidies," 49 U.S.C. 24101(d), while it pursues its statutorily defined "mission" and goals, 49 U.S.C. 24101(b) and (c). Congress has accordingly instructed Amtrak to "use its best business judgment" not for private ends but "to minimize United States Government subsidies." 49 U.S.C. 24101(c)(1). Under these circumstances, it made no sense for the court of appeals to conclude that a supposed antithesis between Amtrak's "own financial benefit" and "the common good" reflects "the very essence of the public-private distinction" served by the nondelegation doctrine. Pet. App. 20a.

b. In addition to specifying Amtrak's goals and many of the means it will use to pursue them, Congress has maintained other direct forms of governmental control. As noted above, Amtrak is virtually wholly owned by the federal government. This is "not merely" the kind of "temporary control" that may occur with "a private corporation whose stock comes into

federal ownership." *Lebron*, 513 U.S. at 398. The government also "controls the operation of the corporation through its appointees." *Id.* at 399. That significant form of control has been strengthened since *Lebron* was decided. Now, eight of Amtrak's nine directors (including the Secretary of Transportation, who serves as an *ex officio* board member) are appointed by the President with the advice and consent of the Senate, 49 U.S.C. 24302(a)(1), and they are understood to be removable without cause by the President, see *Holdover and Removal of Members of Amtrak's Reform Board*, 27 Op. O.L.C. 163, 166 (2003). As in *Lebron*, see 513 U.S. at 385, the ninth director (Amtrak's own President) is selected by the other eight directors, and serves at their pleasure. 49 U.S.C. 24302(a)(1)(B), 24303(a).

Congress has also used other mechanisms to control Amtrak's management. It has set the salary limits for Amtrak's officers. See 49 U.S.C. 24303(b). It has required Amtrak to submit various reports about its operations to Congress and the President. See, *e.g.*, 49 U.S.C. 24315(a) and (b). In PRIIA alone, it required several aspects of Amtrak's activities to be reviewed by the Department of Transportation's Inspector General (see PRIIA §§ 203(b), 204(d), 221, 225, 227, 122 Stat. 4913, 4914, 4931, 4933, 4934)—even though Amtrak already has its own Inspector General, as noted above (see p. 39 & n.16, *supra*), whose office receives appropriations directly from Congress (see, *e.g.*, Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, Div. C, Tit. III, 125 Stat. 704).

c. Finally, Amtrak's subservience to the federal government, rather than private interests, is also

reflected in the stark reality that, in its first 43 years of operation, it has received more than $41 billion in federal subsidies, and the subsidies continue at a rate of more than $1 billion annually. See p. 5 & n.2, *supra*.

Thus, the federal government's substantial and direct connections with Amtrak itself—to say nothing of the extensive involvement of the FRA in the promulgation of the Amtrak-performance metrics and standards and the STB's responsibility for adjudicating any proceeding triggered by the metrics and standards—belie the court of appeals' conclusion that Congress somehow sought to "absolv[e] the federal government of all responsibility" for the metrics and standards. Pet. App. 21a. Contrary to that court's fears, giving the government-created, government-controlled, and government-subsidized Amtrak a role in the development of the metrics and standards to assess its own performance did not make it possible to evade public criticism by claiming that any flaws in the resulting standards are "not the federal government's fault." *Id.* at 18a. Accordingly, even if the metrics and standards were in fact "regulatory," and even if private entities could play no role in their development, the metrics and standards are valid because Amtrak should not be treated as a merely private entity for purposes of nondelegation analysis.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. Section 207 of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, Div. B, 122 Stat. 4916-4917 (reprinted at 49 U.S.C. 24101 note) provides:

METRICS AND STANDARDS.

(a) IN GENERAL.—Within 180 days after the date of enactment of this Act [Oct. 16, 2008], the Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services. Such metrics, at a minimum, shall include the percentage of avoidable and fully allocated operating costs covered by passenger revenues on each route, ridership per train mile operated, measures of on-time performance and delays incurred by intercity passenger trains on the rail lines of each rail carrier and, for long-distance routes, measures of connectivity with other routes in all regions currently receiving Amtrak service and the transportation needs of communities and populations that are not well-served by other forms of intercity transportation. Amtrak shall provide reasonable access to the Federal Railroad Administration in order

to enable the Administration to carry out its duty under this section.

(b) QUARTERLY REPORTS.—The Administrator of the Federal Railroad Administration shall collect the necessary data and publish a quarterly report on the performance and service quality of intercity passenger train operations, including Amtrak's cost recovery, ridership, on-time performance and minutes of delay, causes of delay, on-board services, stations, facilities, equipment, and other services.

(c) CONTRACTS WITH HOST RAIL CARRIERS.—To the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards developed under subsection (a) into their access and service agreements.

(d) ARBITRATION.—If the development of the metrics and standards is not completed within the 180-day period required by subsection (a), any party involved in the development of those standards may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration.

* * * * *

2. 49 U.S.C. 24101 provides in pertinent part:

Findings, mission, and goals

(a) FINDINGS.—(1) Public convenience and necessity require that Amtrak, to the extent its budget allows, provide modern, cost-efficient, and energy-efficient intercity rail passenger transportation be-

tween crowded urban areas and in other areas of the United States.

* * * * *

(b) MISSION.—The mission of Amtrak is to provide efficient and effective intercity passenger rail mobility consisting of high quality service that is trip-time competitive with other intercity travel options and that is consistent with the goals of subsection (d).

(c) GOALS.—Amtrak shall—

(1) use its best business judgment in acting to minimize United States Government subsidies, including—

(A) increasing fares;

(B) increasing revenue from the transportation of mail and express;

(C) reducing losses on food service;

(D) improving its contracts with operating rail carriers;

(E) reducing management costs; and

(F) increasing employee productivity;

(2) minimize Government subsidies by encouraging State, regional, and local governments and the private sector, separately or in combination, to share the cost of providing rail passenger transportation, including the cost of operating facilities;

(3) carry out strategies to achieve immediately maximum productivity and efficiency consistent with safe and efficient transportation;

(4) operate Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetables;

(5) develop transportation on rail corridors subsidized by States and private parties;

(6) implement schedules based on a systemwide average speed of at least 60 miles an hour that can be achieved with a degree of reliability and passenger comfort;

(7) encourage rail carriers to assist in improving intercity rail passenger transportation;

(8) improve generally the performance of Amtrak through comprehensive and systematic operational programs and employee incentives;

(9) provide additional or complementary intercity transportation service to ensure mobility in times of national disaster or other instances where other travel options are not adequately available;

(10) carry out policies that ensure equitable access to the Northeast Corridor by intercity and commuter rail passenger transportation;

(11) coordinate the uses of the Northeast Corridor, particularly intercity and commuter rail passenger transportation; and

(12) maximize the use of its resources, including the most cost-effective use of employees, facilities, and real property.

(d) MINIMIZING GOVERNMENT SUBSIDIES.—To carry out subsection (c)(12) of this section, Amtrak is encouraged to make agreements with the private sec-

tor and undertake initiatives that are consistent with good business judgment and designed to maximize its revenues and minimize Government subsidies. Amtrak shall prepare a financial plan, consistent with section 204 of the Passenger Rail Investment and Improvement Act of 2008, including the budgetary goals for fiscal years 2009 through 2013. Amtrak and its Board of Directors shall adopt a long-term plan that minimizes the need for Federal operating subsidies.

3. 49 U.S.C. 24301 provides in pertinent part:

Status and applicable laws

(a) STATUS.—Amtrak—

(1) is a railroad carrier under section 20102(2)[2] and chapters 261 and 281 of this title;

(2) shall be operated and managed as a for-profit corporation; and

(3) is not a department, agency, or instrumentality of the United States Government, and shall not be subject to title 31.

(b) PRINCIPAL OFFICE AND PLACE OF BUSINESS.—The principal office and place of business of Amtrak are in the District of Columbia. Amtrak is qualified to do business in each State in which Amtrak carries out an activity authorized under this part. Amtrak shall accept service of process by certified mail addressed to the secretary of Amtrak at its principal

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[2] See references in text note below.

office and place of business. Amtrak is a citizen only of the District of Columbia when deciding original jurisdiction of the district courts of the United States in a civil action.

(c) APPLICATION OF SUBTITLE IV.—Subtitle IV of this title shall not apply to Amtrak, except for sections 11123, 11301, 11322(a), 11502, and 11706. Notwithstanding the preceding sentence, Amtrak shall continue to be considered an employer under the Railroad Retirement Act of 1974, the Railroad Unemployment Insurance Act, and the Railroad Retirement Tax Act.

(d) APPLICATION OF SAFETY AND EMPLOYEE RELATIONS LAWS AND REGULATIONS.—Laws and regulations governing safety, employee representation for collective bargaining purposes, the handling of disputes between carriers and employees, employee retirement, annuity, and unemployment systems, and other dealings with employees that apply to a rail carrier subject to part A of subtitle IV of this title apply to Amtrak.

(e) APPLICATION OF CERTAIN ADDITIONAL LAWS. —Section 552 of title 5, this part, and, to the extent consistent with this part, the District of Columbia Business Corporation Act (D.C. Code § 29-301 et seq.) apply to Amtrak. Section 552 of title 5, United States Code, applies to Amtrak for any fiscal year in which Amtrak receives a Federal subsidy.

* * * * *

4. 49 U.S.C. 24302 provides:

Board of directors

(a) COMPOSITION AND TERMS.—

(1) The Amtrak Board of Directors (referred to in this section as the "Board") is composed of the following 9 directors, each of whom must be a citizen of the United States:

(A) The Secretary of Transportation.

(B) The President of Amtrak.

(C) 7 individuals appointed by the President of the United States, by and with the advice and consent of the Senate, with general business and financial experience, experience or qualifications in transportation, freight and passenger rail transportation, travel, hospitality, cruise line, or passenger air transportation businesses, or representatives of employees or users of passenger rail transportation or a State government.

(2) In selecting individuals described in paragraph (1) for nominations for appointments to the Board, the President shall consult with the Speaker of the House of Representatives, the minority leader of the House of Representatives, the majority leader of the Senate, and the minority leader of the Senate and try to provide adequate and balanced representation of the major geographic regions of the United States served by Amtrak.

(3) An individual appointed under paragraph (1)(C) of this subsection shall be appointed for a term of 5 years. Such term may be extended until the individual's successor is appointed and quali-

fied. Not more than 5 individuals appointed under paragraph (1)(C) may be members of the same political party.

(4) The Board shall elect a chairman and a vice chairman, other than the President of Amtrak, from among its membership. The vice chairman shall serve as chairman in the absence of the chairman.

(5) The Secretary may be represented at Board meetings by the Secretary's designee.

(b) PAY AND EXPENSES.—Each director not employed by the United States Government or Amtrak is entitled to reasonable pay when performing Board duties. Each director not employed by the United States Government is entitled to reimbursement from Amtrak for necessary travel, reasonable secretarial and professional staff support, and subsistence expenses incurred in attending Board meetings.

(c) TRAVEL.—(1) Each director not employed by the United States Government shall be subject to the same travel and reimbursable business travel expense policies and guidelines that apply to Amtrak's executive management when performing Board duties.

(2) Not later than 60 days after the end of each fiscal year, the Board shall submit a report describing all travel and reimbursable business travel expenses paid to each director when performing Board duties to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate.

(3) The report submitted under paragraph (2) shall include a detailed justification for any travel or reimbursable business travel expense that deviates from

Amtrak's travel and reimbursable business travel expense policies and guidelines.

(d) VACANCIES.—A vacancy on the Board is filled in the same way as the original selection, except that an individual appointed by the President of the United States under subsection (a)(1)(C) of this section to fill a vacancy occurring before the end of the term for which the predecessor of that individual was appointed is appointed for the remainder of that term. A vacancy required to be filled by appointment under subsection (a)(1)(C) must be filled not later than 120 days after the vacancy occurs.

(e) QUORUM.—A majority of the members serving shall constitute a quorum for doing business.

(f) BYLAWS.—The Board may adopt and amend bylaws governing the operation of Amtrak. The bylaws shall be consistent with this part and the articles of incorporation.

5. 49 U.S.C. 24303 provides:

Officers

(a) APPOINTMENTS AND TERMS.—Amtrak has a President and other officers that are named and appointed by the board of directors of Amtrak. An officer of Amtrak must be a citizen of the United States. Officers of Amtrak serve at the pleasure of the board.

(b) PAY.—The board may fix the pay of the officers of Amtrak. An officer may not be paid more than the general level of pay for officers of rail carriers with comparable responsibility. The preceding sentence

shall not apply for any fiscal year for which no Federal assistance is provided to Amtrak.

(c) CONFLICTS OF INTEREST.—When employed by Amtrak, an officer may not have a financial or employment relationship with another rail carrier, except that holding securities issued by a rail carrier is not deemed to be a violation of this subsection if the officer holding the securities makes a complete public disclosure of the holdings and does not participate in any decision directly affecting the rail carrier.

6. 49 U.S.C. 24305 provides in pertinent part:

General authority

* * * * *

(f) DOMESTIC BUYING PREFERENCES.—(1) In this subsection, "United States" means the States, territories, and possessions of the United States and the District of Columbia.

(2) Amtrak shall buy only—

(A) unmanufactured articles, material, and supplies mined or produced in the United States; or

(B) manufactured articles, material, and supplies manufactured in the United States substantially from articles, material, and supplies mined, produced, or manufactured in the United States.

(3) Paragraph (2) of this subsection applies only when the cost of those articles, material, or supplies bought is at least $1,000,000.

(4) On application of Amtrak, the Secretary of Transportation may exempt Amtrak from this subsection if the Secretary decides that—

(A) for particular articles, material, or supplies—

(i) the requirements of paragraph (2) of this subsection are inconsistent with the public interest;

(ii) the cost of imposing those requirements is unreasonable; or

(iii) the articles, material, or supplies, or the articles, material, or supplies from which they are manufactured, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and are not of a satisfactory quality; or

(B) rolling stock or power train equipment cannot be bought and delivered in the United States within a reasonable time.

7. 49 U.S.C. 24307 provides in pertinent part:

Special transportation

(a) REDUCED FARE PROGRAM.—Amtrak shall maintain a reduced fare program for the following:

(1) individuals at least 65 years of age.

(2) individuals (except alcoholics and drug abusers) who—

(A) have a physical or mental impairment that substantially limits a major life activity of the individual;

(B) have a record of an impairment; or

(C) are regarded as having an impairment.

* * * * *

8. 49 U.S.C. 24308 provides:

Use of facilities and providing services to Amtrak

(a) GENERAL AUTHORITY.—(1) Amtrak may make an agreement with a rail carrier or regional transportation authority to use facilities of, and have services provided by, the carrier or authority under terms on which the parties agree. The terms shall include a penalty for untimely performance.

(2)(A) If the parties cannot agree and if the Surface Transportation Board finds it necessary to carry out this part, the Board shall—

(i) order that the facilities be made available and the services provided to Amtrak; and

(ii) prescribe reasonable terms and compensation for using the facilities and providing the services.

(B) When prescribing reasonable compensation under subparagraph (A) of this paragraph, the Board shall consider quality of service as a major factor when determining whether, and the extent to which, the amount of compensation shall be greater than the incremental costs of using the facilities and providing the services.

(C) The Board shall decide the dispute not later than 90 days after Amtrak submits the dispute to the Board.

(3) Amtrak's right to use the facilities or have the services provided is conditioned on payment of the compensation. If the compensation is not paid promptly, the rail carrier or authority entitled to it may bring an action against Amtrak to recover the amount owed.

(4) Amtrak shall seek immediate and appropriate legal remedies to enforce its contract rights when track maintenance on a route over which Amtrak operates falls below the contractual standard.

(b) OPERATING DURING EMERGENCIES.—To facilitate operation by Amtrak during an emergency, the Board, on application by Amtrak, shall require a rail carrier to provide facilities immediately during the emergency. The Board then shall promptly prescribe reasonable terms, including indemnification of the carrier by Amtrak against personal injury risk to which the carrier may be exposed. The rail carrier shall provide the facilities for the duration of the emergency.

(c) PREFERENCE OVER FREIGHT TRANSPORTATION.—Except in an emergency, intercity and commuter rail passenger transportation provided by or for Amtrak has preference over freight transportation in using a rail line, junction, or crossing unless the Board orders otherwise under this subsection. A rail carrier affected by this subsection may apply to the Board for relief. If the Board, after an opportunity for a hearing under section 553 of title 5, decides that preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers, the Board shall estab-

lish the rights of the carrier and Amtrak on reasonable terms.

(d) ACCELERATED SPEEDS.—If a rail carrier refuses to allow accelerated speeds on trains operated by or for Amtrak, Amtrak may apply to the Board for an order requiring the carrier to allow the accelerated speeds. The Board shall decide whether accelerated speeds are unsafe or impracticable and which improvements would be required to make accelerated speeds safe and practicable. After an opportunity for a hearing, the Board shall establish the maximum allowable speeds of Amtrak trains on terms the Board decides are reasonable.

(e) ADDITIONAL TRAINS.—(1) When a rail carrier does not agree to provide, or allow Amtrak to provide, for the operation of additional trains over a rail line of the carrier, Amtrak may apply to the Board for an order requiring the carrier to provide or allow for the operation of the requested trains. After a hearing on the record, the Board may order the carrier, within 60 days, to provide or allow for the operation of the requested trains on a schedule based on legally permissible operating times. However, if the Board decides not to hold a hearing, the Board, not later than 30 days after receiving the application, shall publish in the Federal Register the reasons for the decision not to hold the hearing.

(2) The Board shall consider—

(A) when conducting a hearing, whether an order would impair unreasonably freight transportation of the rail carrier, with the carrier having the

burden of demonstrating that the additional trains will impair the freight transportation; and

(B) when establishing scheduled running times, the statutory goal of Amtrak to implement schedules that attain a system-wide average speed of at least 60 miles an hour that can be adhered to with a high degree of reliability and passenger comfort.

(3) Unless the parties have an agreement that establishes the compensation Amtrak will pay the carrier for additional trains provided under an order under this subsection, the Board shall decide the dispute under subsection (a) of this section.

(f) PASSENGER TRAIN PERFORMANCE AND OTHER STANDARDS.—

(1) INVESTIGATION OF SUBSTANDARD PERFORMANCE.—If the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters, or the service quality of intercity passenger train operations for which minimum standards are established under section 207 of the Passenger Rail Investment and Improvement Act of 2008 fails to meet those standards for 2 consecutive calendar quarters, the Surface Transportation Board (referred to in this section as the "Board") may initiate an investigation, or upon the filing of a complaint by Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service, the Board shall initiate such an investigation, to determine whether and to what extent delays or failure to achieve minimum standards are

due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators. As part of its investigation, the Board has authority to review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays. In making its determination or carrying out such an investigation, the Board shall obtain information from all parties involved and identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train.

(2) PROBLEMS CAUSED BY HOST RAIL CARRIER.—If the Board determines that delays or failures to achieve minimum standards investigated under paragraph (1) are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation as required under subsection (c), the Board may award damages against the host rail carrier, including prescribing such other relief to Amtral as it determines to be reasonable and appropriate pursuant to paragraph (3) of this subsection.

(3) DAMAGES AND RELIEF.—In awarding damages and prescribing other relief under this subsection the Board shall consider such factors as—

(A) the extent to which Amtrak suffers financial loss as a result of host rail carrier delays or failure to achieve minimum standards; and

(B) what reasonable measures would adequately deter future actions which may reason-

ably be expected to be likely to result in delays to Amtrak on the route involved.

(4) USE OF DAMAGES.—The Board shall, as it deems appropriate, order the host rail carrier to remit the damages awarded under this subsection to Amtrak or to an entity for which Amtrak operates intercity passenger rail service. Such damages shall be used for capital or operating expenditures on the routes over which delays or failures to achieve minimum standards were the result of a rail carrier's failure to provide preference to Amtrak over freight transportation as determined in accordance with paragraph (2).

9. 49 U.S.C. 24710 provides:

Long-distance routes

(a) ANNUAL EVALUATION.—Using the financial and performance metrics developed under section 207 of the Passenger Rail Investment and Improvement Act of 2008, Amtrak shall—

(1) evaluate annually the financial and operating performance of each long-distance passenger rail route operated by Amtrak; and

(2) rank the overall performance of such routes for 2008 and identify each long-distance passenger rail route operated by Amtrak in 2008 according to its overall performance as belonging to the best performing third of such routes, the second best performing third of such routes, or the worst performing third of such routes.

(b) PERFORMANCE IMPROVEMENT PLAN.—Amtrak shall develop and post on its website a performance improvement plan for its long-distance passenger rail routes to achieve financial and operating improvements based on the data collected through the application of the financial and performance metrics developed under section 207 of that Act. The plan shall address—

(1) on-time performance;

(2) scheduling, frequency, routes, and stops;

(3) the feasibility of restructuring service into connected corridor service;

(4) performance-related equipment changes and capital improvements;

(5) on-board amenities and service, including food, first class, and sleeping car service;

(6) State or other non-Federal financial contributions;

(7) improving financial performance;

(8) anticipated Federal funding of operating and capital costs; and

(9) other aspects of Amtrak's long-distance passenger rail routes that affect the financial, competitive, and functional performance of service on Amtrak's long-distance passenger rail routes.

(c) IMPLEMENTATION.—Amtrak shall implement the performance improvement plan developed under subsection (b)—

(1) beginning in fiscal year 2010 for those routes identified as being in the worst performing third under subsection (a)(2);

(2) beginning in fiscal year 2011 for those routes identified as being in the second best performing third under subsection (a)(2); and

(3) beginning in fiscal year 2012 for those routes identified as being in the best performing third under subsection (a)(2).

(d) ENFORCEMENT.—The Federal Railroad Administration shall monitor the development, implementation, and outcome of improvement plans under this section. If the Federal Railroad Administration determines that Amtrak is not making reasonable progress in implementing its performance improvement plan or, after the performance improvement plan is implemented under subsection (c)(1) in accordance with the terms of that plan, Amtrak has not achieved the outcomes it has established for such routes, under the plan for any calendar year, the Federal Railroad Administration—

(1) shall notify Amtrak, the Inspector General of the Department of Transportation, the Committee on Transportation and Infrastructure of the House of Representatives, and the Committee on Commerce, Science, and Transportation of the Senate of its determination under this subsection;

(2) shall provide Amtrak with an opportunity for a hearing with respect to that determination; and

(3) may withhold appropriated funds otherwise available to Amtrak for the operation of a route or

routes from among the worst performing third of routes currently served by Amtrak on which Amtrak is not making reasonable progress, other than funds made available for passenger safety or security measures.

10. 49 U.S.C. 24902 provides in pertinent part:

Goals and requirements

(a) MANAGING COSTS AND REVENUES.—Amtrak shall manage its operating costs, pricing policies, and other factors with the goal of having revenues derived each fiscal year from providing intercity rail passenger transportation over the Northeast Corridor route between the District of Columbia and Boston, Massachusetts, equal at least the operating costs of providing that transportation in that fiscal year.

(b) PRIORITIES IN SELECTING AND SCHEDULING PROJECTS.—When selecting and scheduling specific projects, Amtrak shall apply the following considerations, in the following order of priority:

(1) Safety-related items should be completed before other items because the safety of the passengers and users of the Northeast Corridor is paramount.

(2) Activities that benefit the greatest number of passengers should be completed before activities involving fewer passengers.

(3) Reliability of intercity rail passenger transportation must be emphasized.

(4) Trip-time requirements of this section must be achieved to the extent compatible with the prior-

ities referred to in paragraphs (1)-(3) of this subsection.

(5) Improvements that will pay for the investment by achieving lower operating or maintenance costs should be carried out before other improvements.

(6) Construction operations should be scheduled so that the fewest possible passengers are inconvenienced, transportation is maintained, and the on-time performance of Northeast Corridor commuter rail passenger and rail freight transportation is optimized.

(7) Planning should focus on completing activities that will provide immediate benefits to users of the Northeast Corridor.

(c) COMPATIBILITY WITH FUTURE IMPROVEMENTS AND PRODUCTION OF MAXIMUM LABOR BENEFITS.—Improvements under this section shall be compatible with future improvements in transportation and shall produce the maximum labor benefit from hiring individuals presently unemployed.

(d) AUTOMATIC TRAIN CONTROL SYSTEMS.—A train operating on the Northeast Corridor main line or between the main line and Atlantic City shall be equipped with an automatic train control system designed to slow or stop the train in response to an external signal.

(e) HIGH-SPEED TRANSPORTATION.—If practicable, Amtrak shall establish intercity rail passenger transportation in the Northeast Corridor that carries out section 703(1)(E) of the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94–210, 90 Stat. 121).

(f) EQUIPMENT DEVELOPMENT.—Amtrak shall develop economical and reliable equipment compatible with track, operating, and marketing characteristics of the Northeast Corridor, including the capability to meet reliable trip times under section 703(1)(E) of the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210, 90 Stat. 121) in regularly scheduled revenue transportation in the Corridor, when the Northeast Corridor improvement program is completed. Amtrak must decide that equipment complies with this subsection before buying equipment with financial assistance of the Government. Amtrak shall submit a request for an authorization of appropriations for production of the equipment.

* * * * *

RESPONDENT'S BRIEF

No. 13-1080

IN THE
Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,
Petitioners,

v.

ASSOCIATION OF AMERICAN RAILROADS,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

Amtrak "is not a department, agency, or instrumentality of the United States Government," 49 U.S.C. § 24301(a)(3), yet Section 207 of the Passenger Rail Investment and Improvement Act of 2008 grants Amtrak the power to co-author regulations governing private freight railroads. A unanimous panel of the D.C. Circuit held Section 207 unconstitutional.

The questions presented are:

1. Whether Section 207 violates the nondelegation principle.

2. Whether Section 207 violates the Due Process Clause.

RULE 29.6 STATEMENT

The corporate disclosure statement included in the brief in opposition remains accurate.

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BRIEF FOR RESPONDENT

Respondent Association of American Railroads respectfully submits that the judgment of the court of appeals should be affirmed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 1 of the Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States."

The Fifth Amendment to the Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Relevant statutory provisions are reproduced in the Addendum to this brief.

STATEMENT

Section 207 of the Passenger Rail Investment and Improvement Act of 2008 creates an unprecedented and untenable situation: a for-profit corporation exercising rulemaking authority over other companies in the same industry, and wielding its regulatory power to seize a commercial advantage. The Constitution does not permit Congress to create a corporation, declare it nongovernmental, launch it into the commercial world with a for-profit mandate—and then vest it with regulatory authority over its own industry. Nor does the Constitution permit Congress to empower a private arbitrator to write and issue federal regulations, yet Section 207 delegates that authority as well. Because Section 207 violates both the nondelegation principle and the Due Process Clause, the judgment below should be affirmed.

1. In 1970, Congress established the National Railroad Passenger Corporation, better known as Amtrak, to engage in the commercial enterprise of providing intercity passenger rail service. *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 454 (1985). Congress's purpose was to "revitalize rail passenger service in the expectation that the rendering of such service along certain corridors can be made a profitable commercial undertaking." H.R. Rep. No. 91-1580 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4735, 4735.

Congress specifically provided that Amtrak "is not a department, agency, or instrumentality of the United States Government," but rather "shall be operated and managed" as a private, "for-profit corporation." 49 U.S.C. § 24301(a)(2)-(3); *see also Atchison*, 470 U.S. at 454-55 (Amtrak is "a private, for-profit corporation" that "is not 'an agency or establishment' of the Government but is authorized by the Government to operate or contract for the operation of intercity rail passenger service."). Establishing Amtrak as a private corporation was consistent with historic practice, as "[o]peration of passenger railroads, no less than operation of freight railroads, has traditionally been a function of private industry, not . . . government[ ]." *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 686 (1982).

Amtrak began offering passenger service on May 1, 1971. *Atchison*, 470 U.S. at 456. Because essentially all of the Nation's rail infrastructure was owned at the time by the freight railroads, the only option was to operate Amtrak's passenger trains over the freight railroads' tracks. The same is true today: 97 percent of the 22,000 miles of track over which Amtrak operates is owned by freight railroads. Pet.

App. 4a; *see also Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 410 (1992) ("Most of Amtrak's passenger trains run over existing track systems owned and used by freight railroads.").

The tracks used by the Amtrak trains are also used by the host railroads to move freight traffic. Just as an air-traffic controller manages departures and landings at a busy airport, the freight railroads must carefully schedule and manage the timing and sequencing of the passenger and freight trains operating on their tracks to minimize back-ups and delays. J.A. 180, 188, 195, 203. Amtrak trains limit the host railroad's ability to move freight. Thus, while Amtrak and the freight railroads do not compete for customers, they do compete for a limited resource: capacity, or the ability to operate trains within the limited slots available on a rail line. Pet. App. 19a.

Amtrak has entered into contracts with the freight railroads that host its trains. These contracts—commonly known as operating agreements—are painstakingly negotiated documents that were executed soon after Amtrak's creation and have been amended or renegotiated over the years. J.A. 179-206. The operating agreements establish the agreed-upon conditions governing Amtrak's use of the freight railroads' tracks, and spell out the rights and duties of the parties. *Atchison*, 470 U.S. at 455. The Department of Transportation has recognized that "the operating agreements between Amtrak and its host railroads are private agreements among private parties." CADC J.A. 151.

2. Congress enacted the Passenger Rail Investment and Improvement Act (PRIIA) in 2008. *See* Pub. L. No. 110-432, Division B, 122 Stat. 4848, 4907

(codified generally in Title 49). Section 207(a) of PRIIA provides:

> Within 180 days after the date of enactment of this Act [Oct. 16, 2008], the Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services.

Section 207(c) of PRIIA, entitled "Contracts With Host Rail Carriers," provides: "To the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards developed under subsection (a) into their access and service agreements."

Section 207(d) provides that if Amtrak and the Federal Railroad Administration (FRA) fail to reach agreement on the content of the Metrics and Standards, or for whatever reason do not timely promulgate the Metrics and Standards, "any party involved in the development of those standards may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration."

Section 213(a) of PRIIA empowers the Surface Transportation Board to investigate violations of the Metrics and Standards. If Amtrak's "on-time performance"—a term defined by the Metrics and Standards, *see* PRIIA § 207(a)—falls below 80 percent for two consecutive quarters, or if Amtrak's service fails to satisfy other Metrics and Standards, the Board "may" initiate an investigation—and "shall" launch an investigation if Amtrak or a host railroad files a complaint. *Id.* § 213(a). The Board's investigation will "determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators." *Id.*

Section 213(a) further provides: "If the Board determines that delays or failures to achieve minimum standards . . . are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation," as required by 49 U.S.C. § 24308(c), "the Board may award damages against the host rail carrier" and "prescrib[e] such other relief to Amtrak as it determines to be reasonable and appropriate." In fashioning a remedy, the Board may consider the need for compensation as well as deterrence, and may "order the host rail carrier to remit the damages awarded under this subsection to Amtrak." PRIIA § 213(a).

Amtrak and the FRA published proposed Metrics and Standards on March 13, 2009, J.A. 11, and "jointly issu[ed]" their final rule on May 6, 2010. J.A. 77, 157-158. The final rule stated that "the FRA and Amtrak jointly drafted performance metrics and

standards for intercity passenger rail service," and designated both an FRA official and an Amtrak employee as the contacts for further information. J.A. 157-158. The rule also stated that the FRA had prepared its responses to the comments on the proposed rule "with Amtrak's concurrence." J.A. 81. With regard to concerns expressed by several commenters about Amtrak's role in developing the Metrics and Standards, Amtrak and the FRA responded that the statute left them no choice. They explained that "PRIIA, the statutory basis for these performance measures, directly incorporates Amtrak into their creation by stating that FRA and Amtrak 'shall jointly' develop the Metrics and Standards." J.A. 88.

The final rule provided that Amtrak's on-time performance for each of its routes be assessed by reference to three metrics, each of which must be met for on-time performance to be deemed satisfactory: Effective Speed, Endpoint On-Time Performance, and All-Stations On-Time Performance. J.A. 132-136. These standards and performance requirements differ from, and are more demanding than, provisions in the existing contracts between Amtrak and the host freight railroads. *See, e.g.*, J.A. 192.

- Effective Speed is the distance of the route divided by the average time it actually takes for Amtrak trains on the route to get from one endpoint to the other. To be deemed satisfactory, a route's Effective Speed must be equal to or better than the route's Effective Speed in Fiscal Year 2008. *See* J.A. 132.

- Endpoint On-Time Performance measures how often trains on the route arrive on time at the endpoint terminal. To be deemed satisfactory, Endpoint

OTP must be at least 80 percent (increasing to 85 and 90 percent in future years). J.A. 133-134.

• All-Stations On-Time Performance measures how often the trains on the route arrive on-time at each station on the route. To be deemed satisfactory, All-Stations OTP must be at least 80 percent (increasing to 85 and 90 percent in future years). J.A. 135-136.

Thus, to satisfy the On-Time Performance metric, a route must maintain an Effective Speed equal to or better than the route's Effective Speed in Fiscal Year 2008, and it must maintain an 80 percent Endpoint and All-Stations On-Time Performance (increasing to 85 and 90 percent in future years). J.A. 135-136. Amtrak and the FRA have emphasized that their On-Time Performance metric "is all the more important because deficiencies in performance could subject host railroads to fines administered by the Surface Transportation Board." J.A. 24.

The final rule also addresses permissible delays. It allows the host freight railroad no more than 900 minutes of delays per 10,000 route miles. J.A. 138. In cases where a third party or Amtrak itself is responsible for the delay, those delay minutes do not count toward the host railroad's limit. However, Amtrak and the FRA have explained that the basis for determining who is at fault for a particular delay will be Amtrak's Conductor Delay Reports. *See* J.A. 44 (minutes of delay "is derived from conductor reports"); J.A. 138 n.23. These are reports prepared by the conductor of the delayed Amtrak train and are based solely on what Amtrak's conductor personally observes or assumes. In many cases, the conductor must complete the report and assign fault based on very limited information, *e.g.*, when the train is

stopped for reasons unknown to the Amtrak conductor. In other cases, the conductor may lack full understanding of the reason for a delay, *e.g.*, in a case where the host railroad directs the Amtrak train to stop in order to permit the FRA to inspect the track, the conductor may not realize that the delay was prompted by the Government rather than the host railroad. Consequently, in many instances, the conductor misidentifies the true root cause of a delay. *See* J.A. 181.

The Metrics and Standards became effective on May 11, 2010. J.A. 158.

3. The freight railroads are already burdened by their obligation to host Amtrak trains. Amtrak operates its trains on routes that are primarily used for freight traffic, many of which are at or near capacity. J.A. 180, 188, 195-196, 203-204. Amtrak trains consume a disproportionate share of the limited capacity or "train slots" available on a line. That is because (among other things) passenger trains travel at higher speeds than freight trains, thus requiring the freight trains to pull aside to allow the Amtrak trains to pass. J.A. 180, 188, 195.

Section 207 and the Metrics and Standards exacerbate these burdens in many respects. The Metrics and Standards place greater demands on the host freight railroads and adversely affect their operations and ability to serve their customers. As one railroad official explained, efforts "to achieve the Metrics and Standards will come at the expense of our freight traffic, which in many cases must be delayed." J.A. 190. "For this reason, the Metrics and Standards adversely affect our business by making it more difficult to serve our freight customers and to operate an efficient freight rail network." *Id.* In-

deed, the very day that Amtrak and the FRA issued their regulations, a senior Amtrak official emailed a copy of the regulations to a Union Pacific official, and stated: "These Metrics and Standards will have a big impact on UP and Amtrak." J.A. 206.

That prediction was accurate. The freight railroads have taken many steps in an effort to meet the Metrics and Standards, including modifying freight train schedules to accommodate Amtrak trains, rescheduling maintenance work, rerouting freight traffic, and diverting internal resources. *See* J.A. 182-183, 190-191, 197, 204-205; Pet. App. 11a n.6 ("The record is replete with affidavits from the freight railroads describing the immediate actions the metrics and standards have forced them to take.").

Notwithstanding the freight railroads' extensive efforts, FRA reports demonstrate that the Metrics and Standards are not being met on numerous routes. In February 2011, the FRA issued its first quarterly report identifying the freight railroads' lines on which the Metrics and Standards were not being met. J.A. 159; Pet. App. 30a. The report determined that the Metrics and Standards were not achieved on most of Amtrak's routes during the July-September 2010 period. The FRA issued subsequent quarterly reports based upon Amtrak's data reflecting the same conclusion: the Metrics and Standards were not being met on most routes. *See* CADC J.A. 257-258, 266, 273, 281; District Court Docket Entry No. 8, Attachment Nos. 16, 17, 18 (FRA Quarterly Performance Reports from April, July and September 2011). Armed with such evidence, Amtrak filed a petition for relief with the STB against Canadian National, claiming that the freight railroad "refused to

adopt measures necessary to satisfy the standards developed pursuant to Section 207." J.A. 211.

The Metrics and Standards affect the freight railroads in another way. PRIIA § 207(c) directs the freight railroads to "incorporate the metrics and standards . . . into their access and service agreements" with Amtrak "[t]o the extent practicable." Amtrak has stated that it expects the freight railroads to amend their operating agreements to incorporate the Metrics and Standards pursuant to Section 207. J.A. 199.

4. The Association of American Railroads (AAR) challenged PRIIA § 207 as violating both the nondelegation principle and the Due Process Clause. J.A. 161. The parties agreed that discovery was unnecessary and that the case could be resolved through cross-motions for summary judgment.

The district court concluded that Section 207 was constitutional. While the court acknowledged that "AAR is correct that this scheme in a sense makes Amtrak the FRA's equal—as opposed to its subordinate" in the rulemaking process, Pet. App. 46a, it held that Section 207 was nonetheless a constitutional delegation of power because "the government retains ultimate control over the promulgation of the Metrics and Standards." *Id.* at 44a. The court also held that Section 207 did not violate the Due Process Clause, reasoning that under *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), Amtrak was the Government "for the purpose of individual rights guaranteed against the Government by the Constitution." Pet. App. 37a (internal quotation marks omitted).

The D.C. Circuit reversed. It held that Section 207 "constitutes an unlawful delegation of regulatory

power to a private entity." Pet. App. 3a. The court began "with a principle upon which both sides agree: Federal lawmakers cannot delegate regulatory authority to a private entity." *Id.* at 7a. It then noted "the unprecedented regulatory powers delegated to Amtrak" by Section 207, observing that under the scheme "Amtrak enjoys authority equal to the FRA." *Id.* at 10a. "Should the FRA prefer an alternative to Amtrak's proposed metrics and standards, § 207 leaves it impotent to choose its version without Amtrak's permission." *Id.* The court added that "the government revealingly cites no case—nor have we found any—embracing the position that a private entity may jointly exercise regulatory power on equal footing with an administrative agency." *Id.* at 14a. The court also noted that Section 207(d)'s arbitration provision "polluted the rulemaking process over and above the other defects besetting the statute," in that it "stacked the deck in favor of compromise" by giving Amtrak the power to outsource the rulemaking and making it "entirely possible for metrics and standards to go into effect that had not been assented to by a single representative of the government." *Id.* at 15a. For all of these reasons, the court concluded, Section 207 effects an unconstitutional delegation "[u]nless it can be established that Amtrak is an organ of the government." *Id.* at 16a.

The D.C. Circuit next determined that "Amtrak is a private corporation with respect to Congress's power to delegate regulatory authority." Pet. App. 23a. Although many of Amtrak's Board Members are presidentially appointed and the Government owns most of its stock, Congress expressly provided that Amtrak "shall be operated and managed as a for-profit corporation" and "is not a department, agency, or instrumentality of the United States Gov-

ernment." 49 U.S.C. § 24301(a)(2)-(3). "In deciding Amtrak's status for purposes of congressional delegations, these declarations are dispositive." Pet. App. 23a. The court emphasized that, by delegating rulemaking power to an entity that Congress and Amtrak itself publicly describe as a private company, the Government could evade accountability for the resulting regulations. *Id.* at 18a. The court also noted that "[p]erverse incentives abound" because "[n]othing about the government's involvement in Amtrak's operations restrains the corporation from devising metrics and standards that inure to its own financial benefit rather than the common good." *Id.* at 20a. Finally, even though the Government had "[s]trangely" avoided discussing *Lebron* in its brief, the court nonetheless examined *Lebron* and concluded that this Court "did not opine on Amtrak's status with respect to the federal government's structural powers under the Constitution." *Id.* at 20a n.8, 22a.

The court denied the Government's petition for rehearing en banc. Pet. App. 51a.

SUMMARY OF ARGUMENT

I. Congress may not delegate rulemaking power to private companies or individuals. The principle this Court recognized in *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-11 (1936)—that such delegations are unconstitutional because they are not "delegations to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business"—remains good law today. Although private companies may perform an advisory or ministerial role in rulemaking, they must "function subordinately" to the Government. *Sun-*

shine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940).

Section 207 of PRIIA violates the nondelegation principle by vesting Amtrak and the Federal Railroad Administration with co-equal rulemaking power. Amtrak "is not a department, agency or instrumentality of the United States Government," but rather a private company that is "operated and managed as a for-profit corporation." 49 U.S.C. § 24301(a). The Constitution does not permit a private corporation to co-author federal regulations and then impose those regulations on other companies in the same industry. Here, Amtrak was able to wield the sovereign's regulatory power to its own commercial advantage by issuing regulations that have forced the freight railroads to delay freight traffic in order to benefit Amtrak's for-profit business.

The statute's arbitration provision, Section 207(d), separately violates the nondelegation principle because it permits a private arbitrator to draft and issue the regulations if Amtrak and the FRA reach an impasse—thus excluding the Government entirely from the rulemaking process. The Government urges this Court to construe this provision as requiring the appointment of a Government arbitrator, but the statutory text contains no such requirement and this Court has repeatedly made clear that it does not rewrite statutes, even to avoid constitutional issues. *See United States v. Stevens*, 559 U.S. 460, 480-81 (2010).

Amtrak should not be deemed a federal agency for purposes of a nondelegation analysis. While this Court held in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 399 (1995), that Amtrak may be deemed part of the Government for purposes of the

constitutional *obligations* of Government, it strongly suggested that Amtrak is *not* part of the Government for purposes of the sovereign's inherent *powers and privileges*, such as the rulemaking power. Nor do Amtrak's connections to the Government entitle it to exercise regulatory authority. Amtrak employees are not federal employees, and the Government conceded below that it "does not control Amtrak's day-to-day operations." U.S. CADC Br. at 29. Indeed, the very existence of the arbitration provision—which reflects the need for a third party to resolve impasses—confirms that the Government did not have the ability to control Amtrak's actions in the rulemaking.

II. Section 207 also violates the Due Process Clause. Empowering a corporation to regulate other companies in its own industry violates due process, which requires a "presumptively disinterested" regulator. *Carter Coal*, 298 U.S. at 311-12. A corporation such as Amtrak—which acts under a for-profit mandate and has a powerful commercial self-interest in its own regulations—is not "disinterested."

Section 207 makes Amtrak an unconstitutional hybrid: a corporation that is simultaneously a profit-seeking commercial actor *and* a Government regulator of the very industry in which it is a market participant. Permitting Congress to delegate its Article I power in this way would be dangerous not only to our constitutional structure, but also to businesses that will face the chilling prospect of a for-profit market competitor endowed with the sovereign lawmaking authority of the United States and a mandate to regulate other companies in the same industry for its own commercial benefit.

ARGUMENT

This case presents the question whether Congress can charter a corporation as a nongovernmental entity, launch it into the commercial world with a for-profit mandate, and then give it regulatory power over other companies in the same industry. This Court's precedent—and settled principles of separation of powers and fundamental fairness—foreclose such a delegation.

I. SECTION 207 IS AN UNCONSTITUTIONAL DELEGATION.

A. Congress May Not Delegate Rulemaking Power To Private Companies.

The Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States." Art. I, § 1. Although "[t]his text permits no delegation of those powers," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001), the Court has "long recognized that the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches." *Touby v. United States*, 500 U.S. 160, 165 (1991). "Thus, Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Id.*

While the Court has permitted grants of rulemaking power to executive or judicial actors in the coordinate branches, it has drawn the line at delegations to persons or entities *outside* the Government. For more than 70 years, the Court has recognized that Congress may not delegate to private individuals or companies the power to promulgate regulations governing the conduct of other private parties.

In *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-11 (1936), the Court struck down a statute that granted certain coal producers and miners the power to issue rules setting maximum labor hours and minimum wages. The Court explained that a delegation of rulemaking authority to a private party "is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Id.* at 311. The Court emphasized that "one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property." *Id.*[1]

The Court revisited the private-party nondelegation principle in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940), where it held that Congress may give private entities a role in rulemaking provided that they "function subordinately" to the Government. *Sunshine Anthracite* involved a

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[1] *See also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) ("But would it be seriously contended that Congress could delegate its legislative authority to [private] groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? . . . The answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress."); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928) (invalidating, as an unconstitutional delegation, a zoning ordinance giving landowners the authority to restrict a neighbor's lawful use of his property).

statute authorizing members of the coal industry to propose minimum coal prices to the National Bituminous Coal Commission, a Government agency. The Government then decided whether to adopt, modify or reject the proposals. *See id.* at 398. The Court concluded that Congress had not impermissibly delegated its legislative authority to the industry, because under the statutory scheme, the private actors merely *proposed* minimum prices—it was the Government that had complete and unfettered authority to *determine* the minimum prices. *Id.* at 388, 399.

Following *Carter Coal* and *Sunshine Anthracite*, the courts of appeals have held that Congress may grant private entities no more than a "ministerial" or "advisory" role in the exercise of Government power. For example, in *Pittston Co. v. United States*, 368 F.3d 385 (4th Cir. 2004), the Fourth Circuit "summarize[d] the Supreme Court's holdings" in this area as "articulat[ing] the standard that Congress may employ private entities for *ministerial* or *advisory* roles, but it may not give these entities governmental power over others." *Id.* at 395 (emphases in original). Similarly, in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *abrogated on other grounds by Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), the Third Circuit turned away a nondelegation challenge on the basis that, under the statute in question, the private entities merely "serve[d] an advisory function" and "a ministerial one," and thus did not transgress constitutional boundaries. *Id.* at 1129.[2]

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[2] Although the Court has not struck down a delegation to private parties since *Carter Coal*, the Court has continued to recognize the prohibition on private delegations. *See, e.g., Mis-*

B. Section 207 Violates The Nondelegation Principle.

Section 207 enables Amtrak to wield sovereign power to its own commercial advantage. Amtrak co-authors the rules, triggers the investigation, provides the evidence, and then reaps the benefits. Section 207 also gives Amtrak authority to demand that its contracts with the freight railroads be amended to incorporate the Amtrak-drafted regulations. And in the event the FRA does not agree with Amtrak's preferred approach, Section 207 provides that the Government may be cut out of the rulemaking process entirely and a private arbitrator may step in to write the federal regulations.

1. Section 207 gives Amtrak co-equal rulemaking power with the Department of Transportation.

a. Section 207 violates the nondelegation principle because it grants rulemaking authority to Amtrak—a private, "for-profit corporation" that is "not a department, agency, or instrumentality of the United States Government." 49 U.S.C. § 24301(a).

Amtrak is not limited to a ministerial or advisory role, and it does not "function subordinately" to the

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tretta v. United States, 488 U.S. 361, 373 n.7 (1989) (noting that the challenged statute did not "delegate regulatory power to private individuals"); *id.* at 422 (Scalia, J., dissenting) ("This is an undemocratic precedent that we set—not because of the scope of the delegated power, but because its recipient is not one of the three Branches of Government"); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 125-26 (1978) (Stevens, J., dissenting) (discussing *Carter Coal* with approval and concluding that private delegation violates due process).

Government in the regulatory scheme. *Sunshine Anthracite*, 310 U.S. at 399. To the contrary, the plain text of the statute—that Amtrak and the FRA shall "jointly" develop and issue the Metrics and Standards—establishes that their rulemaking authority is identical. In the Government's words, Amtrak is the "co-author" of the Metrics and Standards. U.S. CADC Br. at 18; *see also* J.A. 158 ("the FRA and Amtrak have jointly made, and are jointly issuing, revisions to the Metrics and Standards"). Section 207 closely resembles the statute struck down in *Carter Coal*, where the private parties were not limited to a subordinate—*i.e.*, ministerial or advisory—role, but were given actual rulemaking power. *See* Pet. App. 14a ("Section 207 is as close to the blatantly unconstitutional scheme in *Carter Coal* as we have seen.").

The FRA was powerless to issue a regulation that Amtrak opposed. Whereas in *Sunshine Anthracite*, the Government could simply have rejected the private parties' advisory proposal and set its own prices, the FRA could not do that here. In fact, Amtrak had the authority to block the rulemaking entirely. At a minimum, Amtrak could use its delegated power as leverage to extract concessions from the Government in the rulemaking by threatening to veto the Government's preferred rule, or to refer the entire rulemaking to an arbitrator who might force the Government to accept a rule it did not want. By giving Amtrak the power to block the rulemaking—or to bring in a private, third-party arbitrator to write the rule over the Government's objections—Section 207 forces a federal agency to compromise with a private party about what the law should be.

b. The Government appears to concede that, as a general matter, a private party cannot be vested

with rulemaking authority. But it contends that Section 207 simply amalgamates different aspects of statutory schemes that have been approved by this Court. The Government's argument bears an uncanny resemblance to the argument rejected in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3159 (2010), in that it assumes that Congress is free to add aspects of the scheme approved in *Sunshine Anthracite* to aspects of the scheme approved in *Currin v. Wallace*, 306 U.S. 1 (1939). *See* U.S. Br. 26; Pet. App. 13a. The Government is mistaken. Section 207 is a unique statute that goes well beyond anything this Court has ever approved.

In *Currin*, the Government wrote tobacco regulations, but provided that the regulations would not be applicable to any given market unless two-thirds of the tobacco growers in the market voted in favor of them. The *Currin* scheme is distinguishable from Section 207 in at least two ways. First, in *Currin*, it was the Government that wrote the regulations; indeed, this Court held the statute constitutional precisely because "it is *Congress* that exercises its legislative authority in making the regulation and in prescribing the conditions of its application." 306 U.S. at 16 (emphasis added). In other words, "Congress has merely placed a restriction upon its *own* regulation . . . ." *Id.* at 15 (emphasis added). The Metrics and Standards, in contrast, are not the Government's "own regulation[s]"; the regulatory authority was exercised jointly by the Government and Amtrak. Second, the Court in *Currin* underscored that "[t]his is not a case where a group of producers may make the law and force it upon a minority." *Id.* Of course, in this case, Section 207 empowered *a single company*

to co-author the law and force it upon the rest of the industry.

The Government also cites *United States v. Rock Royal Co-Op.*, 307 U.S. 533 (1939), which is distinguishable for the same reason: the Court relied on *Currin* in upholding a statute that allowed a supermajority of the regulated parties to determine when a Government-drafted regulation would become effective. The private parties in *Rock Royal* did not draft the regulation themselves and foist it on unwilling companies in the same industry.

This Court has long recognized the distinction between exercising legislative power, on the one hand, and determining when an exercise of legislative power may become effective, on the other. That was the distinction this Court relied upon in *Currin*, as well as in *J.W. Hampton & Co. v. United States*, 276 U.S. 394 (1928), where the Court explained that Congress may permit residents of a district to vote whether to be subject to legislation. "While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district." *Id.* at 407. Under Section 207, Amtrak did not determine when an exercise of legislative power would become effective; rather, it exercised legislative power itself by co-authoring the Metrics and Standards.

The Government has never identified a similar statute—one that vests a federally-chartered, for-profit corporation with regulatory authority over other companies in the same industry. This is an-

other strong indicator that Section 207 is unconstitutional. *See Free Enter. Fund*, 130 S. Ct. at 3159 ("Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity.") (internal quotation marks omitted). Whereas Congress has given self-regulatory organizations authority over an industry, in those cases the organization is subject to Government oversight and is not itself an industry participant that could seek to leverage its regulatory power to serve its own commercial self-interest.[3]

Likewise, the Government has never identified a policy purpose behind the odd and unprecedented rulemaking procedure enshrined in Section 207—let alone suggested that Congress's goals can only be achieved by vesting Amtrak with co-equal rulemaking authority. If Congress believes it important to develop performance metrics for Amtrak, it could easily do so in a way that does not violate the Constitution, such as by giving Amtrak an advisory role in the rulemaking process, as it has done in other statutes. *See, e.g.*, Pub. L. No. 101-610, Title VI, § 601(d), 104 Stat. 3127, 3186 (1990) (directing Secretary of Transportation to consult with Amtrak in issuing regulations). The Government offers no reason to think that Congress needs the ability to make this novel sort of delegation to accomplish its legisla-

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[3] In the D.C. Circuit, the Government noted that Congress gave the former National Association of Securities Dealers authority to "develop rules for disciplinary proceedings concerning their members, subject to the review and approval of the Securities and Exchange Commission." U.S. CADC Br. at 27 (citing the Maloney Act, 15 U.S.C. § 78o-3). That example has now been deleted from the Government's brief, presumably because under the Maloney Act, the SEC has plenary authority to override and rewrite those rules if it chooses.

tive objectives—in this context or in any other context.

c. Section 207 implicates two key purposes underlying the nondelegation principle: that private companies not use regulatory power to their own commercial advantage, and that the Government not be able to evade accountability for regulatory choices.

i. The nondelegation principle helps ensure that private companies "are not able to use their position for their own advantage [and] to the disadvantage of their fellow citizens." *Pittston Co.*, 368 F.3d at 398. Here, "Amtrak may not compete with the freight railroads for customers, but it does compete with them for use of their scarce track." Pet. App. 19a. In that regard, Section 207 "grants Amtrak a distinct competitive advantage: a hand in limiting the freight railroads' exercise of their property rights over an essential resource." *Id.*[4]

Amtrak seized that commercial advantage by drafting regulations that benefit Amtrak and harm the freight railroads. It should be no surprise that the regulations are commercially favorable to Amtrak, and impose standards the freight railroads cannot meet without modifying their operations and further delaying freight traffic. In fact, the on-time performance standards cannot be achieved as a practical matter on many routes. *See, e.g.*, J.A. 189.

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[4] Even if Amtrak and the freight railroads did not compete, Section 207 would still violate the nondelegation principle, as *Carter Coal* makes clear that the constitutional inquiry turns on whether the statute delegates rulemaking power to a private entity. That the delegate may regulate competitors simply *exacerbates* the violation. *See* 298 U.S. at 311 ("[O]ne person may not be entrusted with the power to regulate the business of another, and *especially* of a competitor.") (emphasis added).

What is more, Amtrak and the FRA have determined that the Metrics and Standards will rely on Amtrak-generated "Conductor Delay Reports" to assign responsibility for particular delays. J.A. 44. Thus, not only has Amtrak written the rules, it creates and supplies the evidence that will be used to determine responsibility for violations of its rules.

Amtrak can wield its rulemaking authority to its own commercial advantage in another way: It can leverage its power under Section 207(c)—the provision requiring the freight railroads to incorporate the regulations into their contracts with Amtrak to the extent practicable—in an attempt to pressure the freight railroads to rewrite those contracts or otherwise grant Amtrak concessions or benefits. The Department of Transportation has acknowledged that these contracts are "private agreements among private parties." CADC J.A. 151. The contract provision makes abundantly clear that Section 207 violates the nondelegation principle, as it enables one private party to wield Government power in an attempt to rewrite private contracts at the expense of the other private party. Section 207 has created a system in which Amtrak is poised to reap substantial commercial benefits from the parties it is regulating.

ii. Another key purpose of the prohibition on delegation to private entities is preventing "the harm done thereby to principles of political accountability." *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143 n.41 (D.C. Cir. 1984). When power is delegated outside the Government, the lines of accountability are blurred, and Congress is able to diffuse responsibility for the formulation of policy, undermining an important democratic check on government decisionmaking. *See Free Enter. Fund*, 130 S. Ct. at 3155 ("Without a clear and effective chain of

command, the public cannot determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.") (internal quotation marks omitted); *see also Loving v. United States*, 517 U.S. 748, 758 (1996) ("The clear assignment of power to a branch [of the Government] . . . allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance.").

Here, Congress, the President and Amtrak itself have all publicly and emphatically denied that Amtrak is part of the Government. Congress has provided in the U.S. Code that Amtrak "is not a department, agency, or instrumentality of the United States Government." 49 U.S.C. § 24301(a)(3). The President has also publicly denied accountability for Amtrak, stating that "Amtrak is not an agency or instrument of the U.S. Government." Executive Office of the President, OMB, *Budget of the U.S. Government (FY 2013)*, at 1014. And Amtrak itself proclaims on its website that "Amtrak is a private company" and "not a government agency." *See* www.amtrak.com, not www.amtrak.gov.

As the D.C. Circuit explained, "delegating the government's powers to private parties saps our political system of democratic accountability," and "[t]his threat is particularly dangerous where both Congress and the Executive can deflect blame for unpopular policies by attributing them to the choices of a private entity." Pet. App. 18a. Here, there is diminished public accountability for the exercise of Government lawmaking power under Section 207—because Amtrak and the Government have repeatedly told the public in the plainest possible terms that Amtrak is *not* part of the Government. Congress cannot exercise its Article I lawmaking power by del-

egating it to a corporation that Congress, the President and the corporation itself all deny is a Government actor.

2. The arbitration provision standing alone makes Section 207 an unconstitutional delegation.

The statute's arbitration provision, Section 207(d), gives Amtrak the right—in the event the FRA refuses to bend to Amtrak's demands in the joint rulemaking—to outsource the rulemaking to "binding arbitration" in which the regulations would be written by an unspecified arbitrator appointed by the Surface Transportation Board. This extraordinary provision, in and of itself, renders Section 207 unconstitutional.[5]

Empowering a private arbitrator to override the Government's proposed regulation and replace it with one of the arbitrator's own choosing is a plain violation of the nondelegation principle. The Government emphasizes that the arbitrator would be "government-appointed," U.S. Br. 27, but the constitutional flaw is the identity of the arbitrator, not the appointing entity.

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[5] If the Court were to agree that delegating rulemaking power to a private arbitrator is unconstitutional, it would not need to decide whether Amtrak is a private company for purposes of this case. *See* Section I.C *infra*. Nor is the arbitration clause severable from the remainder of Section 207: PRIIA does not contain a severability clause; Section 207 would not remain "fully operative" absent the dispute-resolution provision because there would be no method for resolving an impasse between Amtrak and the FRA; and there is no basis for concluding that Congress would have enacted Section 207 absent that provision. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-87 (1987).

The Government does not dispute that Section 207 would be unconstitutional if it allowed a private arbitrator to write federal regulations. The Government contends, however, that Section 207(d) should be construed as requiring the appointment of a *Government* arbitrator. U.S. Br. 27-29. But the statute itself does not say this, and the Court "will not rewrite a law to conform it to constitutional requirements." *United States v. Stevens*, 559 U.S. 460, 481 (2010) (internal quotation marks and alteration omitted).

a. The Government contends that "normal principles of statutory construction," U.S. Br. 27, require the words "an arbitrator" in Section 207(d) to be replaced with the words "a Government arbitrator." That is not a tenable reading. Nothing in the text of the statute suggests that Congress required the appointment of a Government arbitrator. In fact, both this Court and the Government itself have recognized that the ordinary meaning of the word "arbitrator" refers to a *nongovernmental* actor. *See, e.g.*, *Gordon v. United States*, 74 U.S. (7 Wall.) 188, 194 (1868) (relying on legal dictionary's definition of "arbitrator" as "'a private extraordinary judge chosen by the parties who have a matter in dispute, invested with power to decide the same'") (emphasis omitted); *The Constitutional Separation of Powers Between the President & Congress*, 20 Op. O.L.C. 124 (1996), 1996 WL 876050, at *15 ("Typically, arbitrators are private individuals chosen by the parties to the dispute."); *Constitutional Limitations on Federal Government Participation in Binding Arbitration*, 19 Op. O.L.C. 208 (1995), 1995 WL 917140, at *5 (arbitrators who resolve disputes involving the federal government "are manifestly private actors who are, at most, independent contractors to, rather than em-

ployees of, the federal government"). The arbitration program currently administered by the STB contemplates that the arbitrator will not be a Government official. *See* 49 C.F.R. § 1108.6.

The Government argues that, in the absence of an "affirmative showing," Congress should not be presumed to have authorized sub-delegations to outside parties. U.S. Br. 27. But the plain text of the statute constitutes an affirmative showing that Congress did not require the appointment of a Government arbitrator. Similarly, although the Government points to other sections of PRIIA calling for the appointment of particular types of arbitrators, *see* U.S. Br. 28, that just undercuts the Government's argument. Congress knows how to place limits on the selection of arbitrators, as it did elsewhere in PRIIA, but it did not place any such limits here. Indeed, Congress knows how to write a statute requiring a Government arbitrator, *see, e.g.*, 7 U.S.C. § 1359ff(a)(2)(A), but it did not do so here.

b. The Government urges the Court to adopt its strained reading based on "principles of constitutional avoidance." U.S. Br. 29. But this Court has repeatedly declined to apply "the canon of avoidance" to "bypass [a] constitutional issue" if doing so would require it to "rewrite the statute, not interpret it." *Stern v. Marshall*, 131 S. Ct. 2594, 2605 (2011) (internal quotation marks and alteration omitted); *see also, e.g.*, *Stevens*, 559 U.S. at 481; *Salinas v. United States*, 522 U.S. 52, 59-60 (1997); *United States v. Monsanto*, 491 U.S. 600, 611 (1989). As the Court has explained, to do so "would constitute a serious invasion of the legislative domain and sharply diminish Congress's incentive to draft a narrowly tailored law in the first place." *Stevens*, 559 U.S. at 481 (internal citations and quotation marks omitted).

In applying this rule, the Court has held that reading atextual qualifications into a statute to avoid constitutional concerns "requires rewriting, not just reinterpretation." *Stevens*, 559 U.S. at 481. For example, in *Stevens*, the Court rejected the Government's invitation to construe 18 U.S.C. § 48—which applies to "anyone who knowingly 'creates, sells, or possesses a depiction of animal cruelty,' if done 'for commercial gain' in interstate or foreign commerce," *id.* at 464-65—"to reach only 'extreme' cruelty." *Id.* at 480; *see also CFTC v. Schor*, 478 U.S. 833, 842 (1986) (refusing to "read into the facially unqualified reference to counterclaim jurisdiction a distinction between counterclaims arising under the Act or CFTC regulations and all other counterclaims" because even if that "reading permitted [us] to avoid a potential Article III problem, it [would do] so only by doing violence to the [Act]").

Moreover, "redraft[ing] the statute" to require the appointment of a Government arbitrator would itself "raise independent constitutional concerns whose adjudication is unnecessary to decide this case." *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479 (1995). Specifically, reading Section 207(d) to require a Government arbitrator would raise serious concerns under the Appointments Clause. Unless the Government arbitrator were appointed by the President and confirmed by the Senate, he or she would be constitutionally prohibited from exercising rulemaking power under *Buckley v. Valeo*, 424 U.S. 1, 140-43 (1976) (per curiam). Moreover, for the STB's appointment to be constitutionally valid, the Government arbitrator would need to be removable at will by the STB, *see Free Enterprise Fund*, 130 S. Ct. at 3162-64; 49 U.S.C. § 701(b)(3), yet Section 207(d) does not address the STB's remov-

al power. All of these constitutional concerns would require this Court to insert *additional* limitations and requirements that do not appear in the statutory text.

The Government cannot salvage the provision by downplaying what it calls a mere "hypothetical possibility" that the STB might appoint a private arbitrator. U.S. Br. 29. As the Court stated in *Stevens*, "[w]e would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." 559 U.S. at 480 (citing *Whitman*, 531 U.S. at 473). Indeed, "[t]he Government's assurance that it will apply [Section 207] far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading." *Id.* Similarly, it is immaterial that the arbitration provision has not yet been invoked. U.S. Br. 27. The nondelegation inquiry turns on the delegation itself—*i.e.*, the authority that Congress conferred by statute—rather than how the delegated authority was actually exercised. Parties cannot cure an unconstitutional delegation of power simply "by declining to exercise some of that power." *Whitman*, 531 U.S. at 473.

3. The Government errs in claiming that the Metrics and Standards have no "regulatory effect" on the freight railroads.

The Government attempts to cure these constitutional shortcomings by raising several arguments intended to downplay the effects of the Metrics and Standards. U.S. Br. 30-37. None of the Government's arguments has merit.

The Government suggests that the Metrics and Standards do not have a "direct regulatory effect" on the freight railroads. U.S. Br. 31. But this is plainly wrong: Section 207 provides that the freight railroads "shall" amend their contracts with Amtrak to incorporate the Metrics and Standards to the extent practicable. This provision has a direct and indisputable regulatory effect on the freight railroads. The Government underscores the "to the extent practicable" language, implying that this qualification somehow eliminates the regulatory effect. U.S. Br. 36. But unless the Government intends to suggest that this qualification renders the statute a nullity—*i.e.*, that it will *never* be practicable for any freight railroad to incorporate a single Metric or Standard—then this provision must have *some* regulatory effect.[6]

The Government insists that the Metrics and Standards "serve primarily as tools to measure Amtrak's own performance." U.S. Br. 30-31. But the Government cannot deny that the Metrics and Standards are *also* intended to measure the freight railroads' performance in hosting Amtrak trains. Indeed, the freight railroads are allotted a certain number of "delay minutes." J.A. 138. Moreover, the statute subjects freight railroads to federal investigations if the Metrics and Standards are not satisfied. Even in cases where the target has done nothing wrong, an investigation can impose significant costs

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[6] The Government's observation, U.S. Br. 36, that Section 207 threatens no specific "statutory penalty" for noncompliance is misleading. Presumably the Government does not mean to suggest that freight railroads may defy Section 207(d)'s mandate without consequence, such as being forced to defend their position before the STB.

of compliance, business uncertainty and harm to reputation.

The Government's suggestion that the Metrics and Standards have no effect on the freight railroads is further undercut by the evidence documenting the many steps the freight railroads have been forced to take in order to satisfy the Metrics and Standards—evidence that the Government did not contest in the district court, where it conceded there were no disputed material facts. *See* Pet. App. 11a n.6 ("The record is replete with affidavits from the freight railroads describing the immediate actions the metrics and standards have forced them to take."); J.A. 179, 186, 194, 202. The Government acknowledges these direct regulatory effects when it admits that "perhaps" the Metrics and Standards had "some incentivizing effect" on the freight railroads. U.S. Br. 30. The Government further undercuts its own argument by pointing to what it claims are the significant changes in Amtrak's on-time performance after the D.C. Circuit issued its decision in this case. *Id.* at 31.

Finally, the Government argues that any future sanctions against the freight railroads would be based on the STB's finding violations of the statutory preference requirement rather than of the Metrics and Standards themselves. U.S. Br. 34 (citing 49 U.S.C. § 24308 (requiring carriers to give preference to Amtrak over freight traffic)).[7] But Amtrak is

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[7] The Government implies that Congress required the freight railroads to give Amtrak preferential access to their tracks "[a]s a condition of relieving railroads of passenger-rail-service obligations." U.S. Br. 2-3. In fact, the Rail Passenger Service Act of 1970 required the freight railroads to make large cash payments to Amtrak over three years "[i]n consideration of being

treating the failure to satisfy the Metrics and Standards as *evidence* that the preference requirement was violated. J.A. 211. Nor can the STB's involvement in enforcing the preference requirement cure the constitutional defects in Section 207, just as the Government's enforcement role did not save the rulemaking scheme in *Carter Coal*. The Board had no authority over the promulgation of the Metrics and Standards. The Constitution does not permit Congress to vest a private party with rulemaking authority on the theory that a federal agency may someday resolve disputes arising under those rules.

C. Amtrak Is Not A Federal Agency For Purposes Of A Nondelegation Analysis.

The Government contends that Amtrak should be deemed a federal agency for purposes of a nondelegation analysis. The Government relies on *Lebron v. National Railroad Passenger Corp.*, 513 U.S.

[Footnote continued from previous page]

relieved of this responsibility." Pub. L. No. 91-518, § 401(a)(2), 84 Stat. 1327, 1334-35. The Interstate Commerce Commission soon recognized that those payments were "the entire consideration" that Congress required of the freight railroads "for being relieved of the common carrier responsibilities for providing intercity rail passenger service." *Penn Cent.-Compensation for Passenger Service*, 342 I.C.C. 765, 768 (1973). The statute requiring the freight railroads to give Amtrak "preference over freight transportation," 49 U.S.C. § 24308(c), was not enacted until 1973. And both the statute and ICC precedent make clear that the freight railroads are entitled to compensation for *at least* the "incremental costs" that Amtrak's use of the tracks imposes. *See* 49 U.S.C. § 24308(a)(2)(B); *Nat'l R.R. Passenger Corp. v. ICC*, 610 F.2d 865, 880 (D.C. Cir. 1979); *Nat'l Rail Passenger Corp. Application*, 1 I.C.C.2d 243, 250 (1984).

374 (1995), as well as what it calls Amtrak's "host of ties" to the Government. U.S. Br. 42.

Notably, the Government did not make its *Lebron* argument to the D.C. Circuit. There, the Government effectively conceded in its brief that Amtrak is a private party for purposes of a nondelegation challenge, but argued that the Government exercised what it called "structural control" over Amtrak. *See* U.S. CADC Br. at 29. In fact, the D.C. Circuit commented on the Government's "[s]trange[ ]" failure to make a *Lebron* argument, concluding that "[p]erhaps this indicates the government's agreement with AAR's reading of [*Lebron*]." Pet. App. 20a n.8.

The Government's new argument is meritless in any event. *Lebron* recognizes that Amtrak should be deemed the Government for purposes of the constitutional obligations of Government, but not for the constitutional powers and privileges of Government.

1. *Lebron* distinguished between Amtrak's status for purposes of the constitutional *obligations* of the Government and the constitutional *powers* of the Government.

Lebron does not hold that Amtrak may exercise the sovereign authority of the United States by promulgating federal regulations. *Lebron* involved an artist who wished to install a politically controversial display in New York's Penn Station. When Amtrak prohibited the installation, the artist sued Amtrak for violating his First Amendment rights. The Court allowed the lawsuit to proceed, holding that Amtrak must be deemed the Government "for the purpose of individual rights guaranteed against

the Government by the Constitution." 513 U.S. at 394.

While *Lebron*'s holding is narrow, the Court's analysis strongly suggests that although Amtrak is part of the Government for purposes of the constitutional *obligations* of the Government—such as the obligation to respect an artist's First Amendment rights—Amtrak is *not* part of the Government for purposes of the inherent *powers and privileges* of the Government. That was the basis on which the Court distinguished its prior case holding that the Bank of the United States was not vested with the inherent constitutional powers of the Government. *See* 513 U.S. at 398-99 (discussing *Bank of the U.S. v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904 (1824)). The Court explained that "it does not contradict [*Bank of the United States*] to hold that [Amtrak] is an agency of the Government, for purposes of the constitutional obligations of Government rather than the privileges of the Government." *Id.* at 399 (internal quotation marks omitted).

Lebron's analysis thus establishes that while Amtrak is a Government agency for purposes of the Government's constitutional obligations, it is *not* a Government agency for purposes of the Government's inherent powers and privileges, such as the Article I lawmaking power. As the Court acknowledged, deeming Amtrak the Government for purposes of exercising governmental power would contradict *Bank of the United States*.

In fact, the *Lebron* Court expressly stated that by establishing Amtrak as a private, for-profit corporation, Congress necessarily "deprive[d] Amtrak of all those inherent powers and immunities of Government agencies that it is within the power of Congress

to eliminate." 513 U.S. at 392. The Court had "no doubt" that "the statutory disavowal of Amtrak's agency status deprives Amtrak of sovereign immunity from suit, and of the ordinarily presumed power of Government agencies authorized to incur obligations to pledge the credit of the United States." *Id.* (citations omitted). If the private charter makes Amtrak a private actor for purposes of these sovereign powers and privileges, it makes Amtrak a private actor for purposes of the sovereign lawmaking power as well.[8]

Congress made a deliberate choice to charter Amtrak as a private, for-profit corporation organized under the District of Columbia Business Corporation Act. This gave Amtrak many benefits in the commercial sphere, including freedom from civil service laws, procurement requirements, and the numerous other obligations of government agencies. *See* David E. Lilienthal & Robert H. Marquis, *The Conduct of Business Enterprises by the Federal Government*, 54 Harv. L. Rev. 545, 562 (1941) ("The corporation, because of its legal status as an entity separate and distinct from the United States, may properly be accorded a measure of financial independence which, in ordinary departments or administrative agencies, might be wholly impracticable.") (footnote omitted).

In fact, in the years since *Lebron* was decided, Congress has taken further steps to eliminate Government control over Amtrak. In 1997, Congress

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[8] The Government errs in suggesting that the D.C. Circuit's approach is inconsistent with *Free Enterprise Fund*. U.S. Br. 41. As the Court acknowledged, the parties in *Free Enterprise Fund* simply did not dispute that the PCAOB should be treated as a Government entity for purposes of the challenges to the removal restrictions in that case. *See* 130 S. Ct. at 3148.

amended 31 U.S.C. § 9101(2) by deleting Amtrak from the list of "mixed-ownership Government corporations"—a list that includes, among others, the Federal Deposit Insurance Corporation and the Resolution Trust Corporation—to make absolutely clear that Amtrak is a private actor. *See* Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, § 415(2), 111 Stat. 2570, 2590-91. In signing the amendment into law, President Clinton explained that the change will "free Amtrak to operate . . . more like a private entrepreneurial corporation." 33 Weekly Comp. Pres. Doc. 1955 (Dec. 2, 1997). The change was significant, in that it relieved Amtrak from many of the audit, accounting and budget reporting requirements set forth in the Government Corporation Control Act, 31 U.S.C. §§ 9101 et seq. The purpose of the change was to avoid federal "micromanagement of Amtrak's operations," H.R. Rep. No. 105-251, at 13 (1997), and to enable Amtrak to "operate as much like a private business as possible." S. Rep. No. 105-85, at 1 (1997), *reprinted in* 1997 U.S.C.C.A.N. 3055, 3055.

Having made the choice to establish Amtrak as a private entity, Congress cannot then vest Amtrak with sovereign powers that the Constitution does not allow private entities to exercise. A federally-chartered corporation cannot be both a commercial actor and a regulator of its own industry. Just as a Government-created corporation cannot claim sovereign immunity when "the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise," *Library of Cong. v. Shaw*, 478 U.S. 310, 317 n.5 (1986), a Government-created entity that functions as a private commercial enterprise cannot claim a similar inherent privilege of Government—the power to make laws and issue

regulations. As this Court held long ago: "The government, by becoming a corporator, lays down its sovereignty so far as respects the transactions of the corporation, and exercises no power or privilege that is not derived from the charter." *Bank of the U.S.*, 22 U.S. at 908.

Lebron cannot possibly be read as permitting Congress to vest Amtrak with rulemaking power. *Lebron* imposes *restrictions* on the power of federally chartered corporations; the Court expressed deep concern over the danger that Congress could violate constitutional limits by devising new ways to structure such corporations. *See* 513 U.S. at 397 ("It surely cannot be that government . . . is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form."). *Lebron* "*constrains* governmental action by whatever instruments or in whatever modes that action may be taken." *Id.* at 392 (emphasis added; internal quotation marks omitted). For the Government to argue that *Lebron* actually *empowers* a federally chartered corporation to exercise sovereign powers that the Constitution bars all other corporations from exercising turns *Lebron* on its head. By admonishing that the Government cannot use the corporate form to evade its constitutional obligations, the Court did not rule that Congress was otherwise free to manipulate the corporate form by vesting Amtrak with sovereign lawmaking power in order to enhance its own for-profit business at the expense of other railroads.

2. Amtrak's connections to the Government do not give Amtrak the power to issue federal regulations.

The Government emphasizes Amtrak's connections to the Government, noting that Amtrak's stock is largely owned by the Government and most of its Board members are presidentially appointed. U.S. Br. 42-46. But none of this can change the fact that Congress chose to establish Amtrak as a private corporation rather than as a federal agency. *See* 49 U.S.C. § 24301(a). Congress cannot vest the sovereign rulemaking power in an entity that it deliberately placed outside of the Government in order to reap the commercial benefits from that designation.

The Government's argument that Amtrak's governmental connections allow Amtrak to exercise the sovereign rulemaking power conflicts with this Court's recognition that Congress's "statutory disavowal" of Amtrak's agency status has consequences. Specifically, the statutory disavowal prevents Amtrak from exercising the powers and privileges of the Government, such as the power to pledge the credit of the United States and the privilege to claim sovereign immunity. *See Lebron*, 513 U.S. at 392. If the Government were correct that Amtrak's ties to the Government were sufficient to override the statutory disavowal, then Amtrak *could* do those things *Lebron* said it *cannot* do.

The Government argues that Amtrak should be allowed to exercise rulemaking power because the Government owns virtually all of Amtrak's stock. U.S. Br. 43. But the Court rejected that argument long ago, when it held that sovereign power does not inhere in a corporation whose stock is owned by the

Government. *See Bank of the U.S.*, 22 U.S. at 908 ("The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the Bank.").[9] The Government also argues that Congress has directed Amtrak to pursue goals in addition to profit-seeking, U.S. Br. 42-43, but that does not differentiate Amtrak from private corporations. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2771 (2014) ("While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so.").

Nothing in this Court's nondelegation decisions suggests that Congress may delegate rulemaking power to private companies that are subsidized by the Government or over which the Government exercises some degree of influence. Surely the Government would not suggest that General Motors, in the days following its bankruptcy, could issue federal regulations on the theory that the Government exercised "sufficient control" over the company.

Any Government "control" over Amtrak for purposes of the Metrics and Standards rulemaking was remote and attenuated in any event. As the Government conceded below, it "does not control Amtrak's day-to-day operations," U.S. CADC Br. at 29, and "[t]he officers and employees who conduct

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[9] The Amtrak stock held by the Government has no voting rights or liquidation preference. *See* Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, Tit. IV, § 415(c)(1)(A) & (2)(A), 111 Stat. at 2590.

Amtrak's day-to-day affairs are not federal employees." *Ehm v. Nat'l R.R. Passenger Corp.*, 732 F.2d 1250, 1255 (5th Cir. 1984); *see also United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 490 (D.C. Cir. 2004) (Roberts, J.) (stating, in case arising under the False Claims Act, that "Amtrak is not the Government"). Under the Government's theory, the Amtrak employees who were tasked with writing the regulations were accountable to their supervisors, and through them to Amtrak's Board of Directors, and through the Board to the President (via the appointment of some but not all Board members) and to Congress (via the funding power). These multiple layers of supervision diluted any federal control that even arguably existed and made it a practical impossibility that the Government actually exercised its purported control over Amtrak in the rulemaking. In fact, any Government official who attempted to direct Amtrak as to how it should conduct the Metrics-and-Standards rulemaking would arguably be violating federal law, which prohibits treating Amtrak as an "instrumentality" or "agency" of the Government. *See* 49 U.S.C. § 24301(a)(3).

Section 207 itself recognizes that Amtrak officials are not subject to Government control in conducting the rulemaking. The dispute-resolution provision giving an arbitrator the power to draft the rule in the event Amtrak and the FRA cannot agree would be completely unnecessary if the Government controlled Amtrak's rulemaking efforts. *See* PRIIA § 207(d). Similarly, Congress has authorized the Attorney General to "bring a civil action for equitable relief in a district court of the United States when Amtrak" acts in a manner "inconsistent with" federal law on rail passenger transportation. 49 U.S.C. § 24103. There would be no need for that provision if

Amtrak's day-to-day operations were in fact under Government control.

Deeming Amtrak the Government for rulemaking purposes would have many troubling consequences. For one thing, Amtrak—unlike every other federal agency—would be able to exercise rulemaking power freed from the constraints of the Administrative Procedure Act and its many procedural protections, such as notice-and-comment requirements and the prohibition on arbitrary and capricious agency action. *See Lebron*, 513 U.S. at 392 (observing that Amtrak is not subject "to statutes that impose obligations . . . upon Government entities, such as the Administrative Procedure Act"). Moreover, Congress could delegate additional regulatory authority to Amtrak to exercise in its own right, without the involvement of any federal agency; and because Amtrak could exercise this power free of any APA constraints, Amtrak would be a more powerful rulemaking body than the Department of Transportation, the Department of Defense, and all other federal agencies.

Treating Amtrak as the Government for rulemaking purposes would also call into question Amtrak's structure under the Appointments Clause. "[R]ulemaking" power may properly "be exercised only by 'Officers of the United States,' appointed in conformity with" the Clause. *Buckley*, 424 U.S. at 140-43. The President of Amtrak (who serves as a member of Amtrak's Board) is appointed not by the President of the United States, however, but by the other eight Board Members. *See* 49 U.S.C. § 24302(a)(1)(B); *id.* § 24303(a).

In sum, Congress cannot give rulemaking power to a company that Congress itself established as a

nongovernmental, for-profit commercial entity—an entity over which it divested itself of day-to-day control by prohibiting federal employees from treating Amtrak as a Government "instrumentality." 49 U.S.C. § 24301(a).

II. SECTION 207 VIOLATES DUE PROCESS.

Congress's power to enter the commercial sphere by creating federally chartered, statutorily "private" corporations is firmly established. *See Lebron*, 513 U.S. at 386-91. Likewise, Congress's power to delegate regulatory authority to federal agencies is well settled. *See Touby*, 500 U.S. at 165. But due process does not permit Congress to *blend* the two—to give a federally chartered, nominally private, for-profit corporation regulatory authority over its own industry. An arrangement of this type violates due process because it allows rulemaking power to be exercised not by a neutral and "presumptively disinterested" regulator, but by a for-profit corporation that is an industry participant and has a direct commercial interest in the substance of its regulations. *See Carter Coal*, 298 U.S. at 311-12. For that reason, Section 207 violates the Due Process Clause of the Fifth Amendment.

A. Due Process Requires Disinterested Rulemaking.

Neither Government officials nor corporations vested with governmental authority may issue regulations when they have a commercial self-interest in the subject of the regulation. This ensures that Government power is exercised in a neutral and disinterested manner consistent with due process.

Carter Coal applied this due process principle to delegations of rulemaking power to corporations. Af-

ter analyzing the challenged statute under nondelegation standards, the Court went on to state that granting a corporation "the power to regulate the business of another, and especially of a competitor," is "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment." 298 U.S. at 311-12 (collecting cases). Because a regulator must be "presumptively disinterested," Congress could not give selected coal companies the power to issue regulations governing the rest of the industry. *Id.* at 311. In short, a regulator must act for the public benefit rather than for the benefit of a particular company in the industry—or even for the majority of companies in the industry, as was the case in *Carter Coal*.

The Court has held in many different contexts that those wielding Government power must be disinterested. In *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), the Court held that due process bars a statutory scheme in which the adjudicator—in that case, a mayor adjudicating violations of Prohibition-era laws—received a portion of the fine, and thus had a personal financial stake in the outcome. Likewise, in *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972), the Court invalidated on due process grounds a similar scheme, in which the mayor—with "executive responsibilities for village finances"—adjudicated traffic violations with fines payable to the village. *See also Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805 (1987) (explaining that partiality is forbidden in the exercise of sovereign authority, and warning of the mere "*potential* for private interest to influence the discharge of public duty") (emphasis in original); *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973) (due process violated when individuals wield Government authority in an area where they have pecuniary interests).

B. Congress May Not Give Amtrak Regulatory Authority Over Its Own Industry.

Due process does not allow Congress to create a private, for-profit corporation and give it regulatory authority over its own industry. This Court has long respected the "fundamental" distinction between market participant and market regulator. *See Carter Coal*, 298 U.S. at 311 ("The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a government function . . . ."). A for-profit commercial participant in a market cannot also be a disinterested regulator of that market because its regulatory judgments will be based on its own narrow commercial interest rather than the broader public interest.

Amtrak cannot be a "presumptively disinterested" regulator of the railroad industry. *Carter Coal*, 298 U.S. at 311. Amtrak directors are required by federal law to make decisions in a way that increases Amtrak's profits. *See* 49 U.S.C. § 24301(a)(2). Indeed, Congress has directed Amtrak not to conduct itself like a neutral and disinterested regulatory agency, but rather to "use its best business judgment" in generating profit for Amtrak by "improving its contracts with operating rail carriers," and by "undertak[ing] initiatives . . . designed to maximize [Amtrak's] revenues." 49 U.S.C. § 24101(c)-(d).

Amtrak had a strong commercial interest in the substance of its Metrics and Standards—and it had powerful financial incentives to draft the regulations in ways that would be favorable to Amtrak's for-profit business and unfavorable to the freight railroads. Moreover, Amtrak's officers had a *personal*

financial interest in the substance of their regulations. Under federal law, Amtrak's officers may receive pay greater than "the general level of pay for officers of rail carriers with comparable responsibility" for any year in which Amtrak does not receive federal assistance, 49 U.S.C. § 24303(b), thus giving them a strong private financial incentive to maximize Amtrak's profits. The potential for financial self-interest affecting the regulatory decisions of Amtrak officers is not just theoretical—it is built into federal law.[10]

It is no answer to say that because Amtrak's charter requires it to pursue "public" goals, such as providing passenger rail service, *any* regulation Amtrak enacts is by definition in the "public interest." The public interest necessarily encompasses *all* market participants—including the freight railroads that serve shippers and consumers of goods throughout the United States—and nothing in Amtrak's charter requires Amtrak to regulate through anything other than an Amtrak-focused lens. In issuing the Metrics and Standards, Amtrak was motivated to regulate the railroad industry with the goal of benefiting a single corporation within that industry—Amtrak. Amtrak's "private company" designation,

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[10] In fact, the Government admitted in the district court that Amtrak had the incentive to engage in biased rulemaking, but argued that the FRA's involvement "*decreased* Amtrak's desire to act in a biased fashion." U.S. MSJ Opp., District Court Docket Entry 10, at 4 (emphasis added). Of course, regulators exercising government power should have *no* bias—not just a "decreased" bias—and the Government cited no authority for the proposition that any danger of bias is eliminated if a decision is made jointly by a biased decisionmaker and an unbiased decisionmaker. *Cf. Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824-28 (1986) (single biased judge taints entire panel).

its for-profit mandate, and the salary incentives for board members further ensured that Amtrak would be regulating in the best interests of Amtrak, just as any commercial actor would if Congress happened to grant it regulatory power over its own industry.

Amtrak officials are not government employees running a regulatory agency, but rather are individuals engaged in a commercial enterprise—operating a for-profit passenger railroad on the same tracks used by the freight railroads. Amtrak's board members do not take an oath of office to uphold the Constitution, as do Article II officers vested with rulemaking authority; rather, Amtrak's board members owe a fiduciary duty to the corporation. Indeed, Amtrak itself has told this Court that its officers and directors run Amtrak like a business, not a regulatory agency. In its *Lebron* brief, Amtrak explained that "Amtrak's directors—like the directors of any other private corporation—assume a fiduciary duty to the corporation and its shareholders, common and preferred. That duty is not to operate Amtrak as part of the government, but 'as a for-profit corporation.' It is not to discharge a governmental function, but to oversee a commercial one. The board's duty is to maximize revenues and minimize costs, so as to protect the economic interests of all of the corporation's investors. It is, in short, the duty of a corporate director, not that of a government official." Amtrak Br. in No. 93-1525, 1994 WL 488299, at *28-29 (citation and footnote omitted).

Congress cannot delegate regulatory authority to a corporation that denies it is a regulatory agency, that does not conduct itself like a regulatory agency, and that Congress has specified is *not* a regulatory agency. This Court looks to historic practice as a touchstone for due process, *see Honda Motor Co. v.*

Oberg, 512 U.S. 415, 430 (1994), and the Government has never identified another entity that blends commercial and regulatory functions the way Section 207 envisions. Indeed, Congress's attempt to vest Amtrak with rulemaking power is directly at odds with the way Amtrak has operated since its creation. *See Held v. Nat'l R.R. Passenger Corp.*, 101 F.R.D. 420, 423 (D.D.C. 1984) ("Amtrak has no rulemaking authority."); *see also* Amtrak Br. in No. 93-1525, 1994 WL 488299, at *24 ("Amtrak does not in any sense 'govern'; it runs a commercial railroad.").

The constitutional violation is especially stark with regard to Section 207(c)'s requirement that the freight railroads amend their contracts with Amtrak to incorporate the Metrics and Standards to the extent practicable. Congress launched Amtrak into the commercial sphere to negotiate these contracts with the freight railroads in its role as a private corporation. *See Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 470 (1985) (contracts between freight railroads and Amtrak "are contracts not between the railroads and the United States but simply between the railroads and the nongovernmental corporation, Amtrak"); CADC J.A. 151 (Department of Transportation statement that these contracts are "private agreements among private parties"). Now, Congress is attempting to empower Amtrak to assume the mantle of a Government regulator and amend these private contracts, achieving through regulatory fiat what it could not achieve through negotiation.

Empowering Burger King to regulate McDonald's would violate due process. That result should not change just because the regulating entity is a Government-created corporation. Permitting Government-created corporations to regulate private corpo-

rations in the same industry would be unfair and would give Government-created corporations an immense and unfair competitive advantage in the market, violating this Court's admonishment that when the Government enters the commercial sphere it must compete on a level playing field. *See Cooke v. United States*, 91 U.S. 389, 398 (1875) ("If [the federal government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.").

Because Section 207 vests rulemaking power in a regulator that is not disinterested—and gives a single corporation regulatory authority over the industry where it is a for-profit market participant—the statute violates due process.

C. Respondent's Due Process Challenge Is Properly Before This Court.

This Court should reach and resolve the due process claim. Respondent has consistently pressed its due process challenge in the district court, the court of appeals, and this Court, and it was fully briefed below. There are no factual disputes that would prevent this Court from resolving the challenge. Moreover, as the Court recognized in *Carter Coal*, nondelegation and due process claims are related and often overlap. *See* 298 U.S. at 311 (discussing both nondelegation and due process). As the decision below illustrates, the lower courts would benefit from guidance on these issues. *See* Pet. App. 8a n.3 (questioning whether there was a substantive difference between nondelegation and due process claims in this context).

The Government suggests that respondent's due process argument depends on a determination that

Amtrak is a private actor. U.S. Br. 11. Not so. Amtrak's status as a private corporation *exacerbates* the due process violation, but is not necessary to *establish* the violation. Respondent's due process claim was framed broadly. *See* J.A. 177 (complaint alleging that "Section 207 of PRIIA violates the due process rights of the freight railroads because it purports to empower Amtrak to wield legislative and rulemaking power to enhance its commercial position at the expense of other industry participants"). As the D.C. Circuit recognized, AAR's "complaint asserted . . . that empowering Amtrak to regulate its competitors violates the Fifth Amendment's Due Process Clause." Pet. App. 6a (citing Compl. ¶¶ 47-54, at 16-17); *see also id.* at 23a (noting "AAR's separate argument that Amtrak's involvement in developing the metrics and standards deprived its members of due process"). But even if the Government were correct—and it is not—this Court will reach "a new argument" in support of a party's "consistent claim" of constitutional violation, *Lebron* 513 U.S. at 379, and there is no question that respondent has vigorously pressed its due process claim at all stages of this case.

CONCLUSION

The Government has never identified another statute that vests a private, for-profit corporation with rulemaking power over other companies in the same industry, let alone a statute that empowers a private arbitrator to draft and issue federal regulations. Delegation to an Executive Branch agency is one thing; delegation to a federally-chartered corporation and an arbitrator is something quite different and crosses long-settled constitutional lines.

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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ADDENDUM

Section 207 of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4916 (codified at 49 U.S.C. § 24101 note)

SEC. 207. METRICS AND STANDARDS.

(a) IN GENERAL.—Within 180 days after the date of enactment of this Act, the Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services. Such metrics, at a minimum, shall include the percentage of avoidable and fully allocated operating costs covered by passenger revenues on each route, ridership per train mile operated, measures of on-time performance and delays incurred by intercity passenger trains on the rail lines of each rail carrier and, for long-distance routes, measures of connectivity with other routes in all regions currently receiving Amtrak service and the transportation needs of communities and populations that are not well-served by other forms of intercity transportation.

Amtrak shall provide reasonable access to the Federal Railroad Administration in order to enable the Administration to carry out its duty under this section.

(b) QUARTERLY REPORTS.—The Administrator of the Federal Railroad Administration shall collect the necessary data and publish a quarterly report on the performance and service quality of intercity passenger train operations, including Amtrak's cost recovery, ridership, on-time performance and minutes of delay, causes of delay, on-board services, stations, facilities, equipment, and other services.

(c) CONTRACTS WITH HOST RAIL CARRIERS.—To the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards developed under subsection (a) into their access and service agreements.

(d) ARBITRATION.—If the development of the metrics and standards is not completed within the 180-day period required by subsection (a), any party involved in the development of those standards may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration.

Section 213(a) of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4916 (codified at 49 U.S.C. § 24308(f))

SEC. 213. PASSENGER TRAIN PERFORMANCE.

* * *

"(f) PASSENGER TRAIN PERFORMANCE AND OTHER STANDARDS.—

"(1) INVESTIGATION OF SUBSTANDARD PERFORMANCE.—If the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters, or the service quality of intercity passenger train operations for which minimum standards are established under section 207 of the Passenger Rail Investment and Improvement Act of 2008 fails to meet those standards for 2 consecutive calendar quarters, the Surface Transportation Board (referred to in this section as the 'Board') may initiate an investigation, or upon the filing of a complaint by Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service, the Board shall initiate such an investigation, to determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators. As part of its investigation, the Board has authority to review the accuracy of the train performance data and the ex-

tent to which scheduling and congestion contribute to delays. In making its determination or carrying out such an investigation, the Board shall obtain information from all parties involved and identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train.

"(2) PROBLEMS CAUSED BY HOST RAIL CARRIER.—If the Board determines that delays or failures to achieve minimum standards investigated under paragraph (1) are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation as required under subsection (c), the Board may award damages against the host rail carrier, including prescribing such other relief to Amtrak as it determines to be reasonable and appropriate pursuant to paragraph (3) of this subsection.

"(3) DAMAGES AND RELIEF.—In awarding damages and prescribing other relief under this subsection the Board shall consider such factors as—

"(A) the extent to which Amtrak suffers financial loss as a result of host rail carrier delays or failure to achieve minimum standards; and

"(B) what reasonable measures would adequately deter future actions which may reasonably be expected to be likely to result in delays to Amtrak on the route involved.

"(4) USE OF DAMAGES.—The Board shall, as it deems appropriate, order the host rail carrier to remit the damages awarded under this subsection to Amtrak or to an entity for which Amtrak operates intercity passenger rail service. Such damages shall be used for capital or operating expenditures on the

routes over which delays or failures to achieve minimum standards were the result of a rail carrier's failure to provide preference to Amtrak over freight transportation as determined in accordance with paragraph (2).".

* * *

49 U.S.C. § 24301

§ 24301. Status and applicable laws

(a) Status.—Amtrak—

(1) is a railroad carrier under section 20102(2) and chapters 261 and 281 of this title;

(2) shall be operated and managed as a for-profit corporation; and

(3) is not a department, agency, or instrumentality of the United States Government, and shall not be subject to title 31.

* * *

REPLY BRIEF

No. 13-1080

In the Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

ASSOCIATION OF AMERICAN RAILROADS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

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ASSOCIATION OF AMERICAN RAILROADS

ON WRIT OF CERTIORARI
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REPLY BRIEF FOR THE PETITIONERS

In Section 207(a) of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Congress required the Federal Railroad Administration (FRA) to work "jointly" with Amtrak in developing or improving the metrics and standards that would be used to evaluate Amtrak's own performance and trigger investigations by the Surface Transportation Board (STB). 49 U.S.C. 24101 note. Repeating the court of appeals' principal errors, respondent contends (Br. 13) that Section 207 impermissibly delegated "rulemaking power" to a "private corporation." But the authority here was not "rulemaking power," and Amtrak is not a "private" entity for nondelegation purposes. Moreover, this Court has sustained the constitutionality of statutes that gave private entities an effective veto power over agency proposals. The Court should therefore reverse the court of appeals' nondelegation

decision. If the Court chooses to address, in the first instance, a constitutional question outside the scope of the question presented, it should also reject respondent's due-process claim.

A. Section 207 Did Not Delegate "Rulemaking" Power To Amtrak

As explained in our opening brief (at 19-37), the government retained sufficient control over the development, adoption, and application of the Amtrak-performance metrics and standards. Section 207 therefore avoids nondelegation concerns. Respondent's repeated assertions that Amtrak exercised "rulemaking" authority (Resp. Br. 1, 13, 14, 18, 19, 22, 24, 33, 38, 39, 40, 41) do not make it so. Nor was Section 207 rendered unconstitutional, as respondent contends (Br. 26-30), by its never-invoked provision for using a government-appointed arbitrator to resolve any impasse between the FRA and Amtrak.

1. Amtrak's effective veto authority over the metrics and standards did not constitute an impermissible delegation

a. Echoing the court of appeals, respondent contends that Section 207 was fatally flawed because it made the FRA "powerless to issue a regulation that Amtrak opposed." Resp. Br. 19; see also Pet. App. 10a ("§207 leaves [the FRA] impotent to choose its version without Amtrak's permission"). But, as explained in our opening brief (at 21-24), even assuming *arguendo* that the metrics and standards were tantamount to regulations, this Court has previously approved statutory schemes under which true regulatory standards were subject to private parties' veto powers.

Respondent does not even attempt to distinguish *St. Louis, Iron Mountain & Southern Railway* v. *Taylor*, 210 U.S. 281 (1908), which sustained a statute that authorized a private railway association to establish standard heights for drawbars on railroad cars. See *id.* at 286-287; Gov't Br. 20 n.5.[1] And respondent no longer seeks to distinguish *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939), and *Currin* v. *Wallace*, 306 U.S. 1 (1939), on the ground that they involved only the power to "*opt out* of the exercise of coercive state power." Gov't Br. 23 (quoting Br. in Opp. 17). But the distinction respondent now advances is no more persuasive. *Currin* explained that Congress could condition the effectiveness of its "own regulation" on the approval of private parties. 306 U.S. at 15; see also *id.* at 16 ("[I]t is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application."). In respondent's view (Br. 20-21), the Court was distinguishing between an instance in which a governmental agency drafts a proposed regulation subject to a private party's veto and one in which the private party has both a final veto authority and the ability to participate in the earlier drafting process. In either case, however, a private entity has

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[1] In *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), the Court did not cast doubt on that decision. Instead, the Court treated it as involving a permissible delegation involving a matter "of a more or less technical nature." *Id.* at 537. The same is true of Section 207. As explained below, the metrics and standards primarily serve to provide information about Amtrak's operations and to describe (and limit) the occasions on which the STB may or will investigate whether a host railroad has failed to comply with the statute requiring Amtrak's trains to receive a preference over freight transportation. See pp. 5-7, *infra*.

the power to decide whether a regulation that the government desires can be "foist[ed]" on "unwilling companies in the same industry." Resp. Br. 21. Whether or not a private party formally shares the pen at the drafting stage, its power to withhold ultimate approval can influence what the agency proposes.

b. Thus, respondent is ultimately forced to contend (Br. 19) that "Section 207 closely resembles the statute struck down in" *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936). It is true that the minimum-wage and maximum-hour regulations that the Court invalidated in *Carter Coal* were written by private industry. *Id.* at 283-284, 310-312. The critical flaw there, however, was not public–private co-authorship. Instead, the government had no participation in the process at all; it could not even prevent the industry's proposals from going into effect. *Id.* at 284. Here, by contrast, the metrics and standards could not take effect without both the active participation (during the drafting process) and the independent assent (at the end) of a governmental entity, the FRA. In that regard, Section 207 of PRIIA is materially different from the statutory scheme invalidated in *Carter Coal*.

Section 207 is also more like the co-authorship regime that the Court sustained in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), in which a governmental entity retained the power to approve, disapprove, or modify prices proposed by coal producers. *Id.* at 399 (citing *Currin* in support of the proposition that industry's role was "unquestionably valid"). While PRIIA is not identical to the arrangement at issue in *Sunshine Anthracite*, that decision's reliance on *Currin*—which sustained a statute conferring a

private veto power over the government's proposals—shows that respondent over-reads *Sunshine Anthracite* by suggesting that it supports only statutes in which a private entity is wholly "subordinate[d]" to the government. Resp. Br. 18-19 (quoting *Sunshine Anthracite*, 310 U.S. at 399).

2. The metrics and standards do not reflect "rulemaking" authority or impose "regulatory" effects on host railroads

Amtrak's role in the development of the Amtrak-performance metrics and standards also poses no non-delegation problem because the metrics and standards do not reflect the exercise of "rulemaking" authority (Resp. Br. 1) or permit Amtrak to "regulate other private entities" (Pet. App. 6a).

a. As explained in our opening brief (at 7-9, 30-37), the metrics and standards serve primarily as tools to measure Amtrak's own performance and to establish in part the circumstances under which the STB may investigate whether a host railroad has violated the independent and long-standing statutory requirement that Amtrak's passenger trains receive "preference over freight transportation in using a rail line, junction, or crossing." 49 U.S.C. 24308(c) and (f).

There can be no doubt that Congress may authorize private parties to play a role in triggering a government investigation or adjudicatory proceeding. See Gov't Br. 32-34. As the district court concluded, "[m]erely granting a private party the power of referral * * * does not pose a constitutional problem." Pet. App. 48a. Here, in response to concerns that host railroads were failing to honor the statutory preference requirement, Congress created a mechanism by which Amtrak could seek to have that preference

requirement enforced (or by which others, such as host railroads, could seek a determination that certain delays had *not* been caused by a violation of the statutory preference requirement). That mechanism is an administrative proceeding before an independent governmental entity, the STB. 49 U.S.C. 24308(f). Congress could have given Amtrak the ability to initiate such a proceeding whenever it believed the statutory requirement had been violated. Instead, it provided that the metrics and standards would, in addition to providing useful information to Congress and the public, help determine when Amtrak could—*and when it could not*—trigger a governmental investigation. In the course of any resulting investigation, the actual regulatory (and adjudicatory) authority will be wielded by the STB, not Amtrak. And any sanctions against a host railroad will turn on violations of the long-established statutory preference requirement, not the metrics and standards. See 49 U.S.C. 24308(f)(2). By the same token, any actions that the host railroads might choose to take to avoid potential sanctions—such as "modifying their operations and further delaying freight traffic," Resp. Br. 23—are also attributable to that statutory preference.

The permissibility of that arrangement follows *a fortiori* from *National Railroad Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407 (1992), a case that respondent simply ignores. There, the Court found that Congress had not delegated eminent-domain power to Amtrak by authorizing it to initiate a proceeding before the Interstate Commerce Commission (the STB's predecessor) to condemn another railroad's property, even though the statute in question "create[d] a *presumption* in favor of conveyance

to Amtrak." *Id.* at 421 (emphasis added); Gov't Br. 33-34.

b. For similar reasons, respondent is misguided in suggesting (Br. 24) that the metrics and standards impermissibly allow Amtrak to "create[] and suppl[y] the evidence" that will be used in the STB's investigation. In fact, the statute directs the STB to receive information from "all parties" and authorizes the STB to "review the accuracy of the train performance data" to determine what causes actually "contribute[d]" to the underlying "delays" (49 U.S.C. 24308(f)(1)), notwithstanding what the reports of Amtrak's conductors say. See Gov't Br. 34-35 & n.13; see also J.A. 120 (response to comment on proposed metrics and standards, noting that "individual host railroads can use their own data, when practicable following reporting of the delay, to help resolve discrepancies with Amtrak and help identify the incidents that may have contributed to delays"). Indeed, respondent itself has explained that host railroads are creating their own evidence for defensive use in such investigations. J.A. 182, 183, 190, 197, 205. But they cannot claim to have any constitutional immunity from the costs associated with a governmental investigation into their potential statutory violations, whether or not that investigation was triggered by someone they consider a business competitor.

c. Respondent also pins (Br. 24, 31) its attempt to locate a regulatory effect on the requirement in Section 207(c) of PRIIA that the metrics and standards be incorporated, "[t]o the extent practicable," into the "access and service agreements" between Amtrak and host railroads. 49 U.S.C. 24101 note. But those operating agreements are individual contracts that are

subject to the give-and-take of bargaining between Amtrak and the host railroads. Amtrak did not need statutory authority to make demands in the course of those negotiations, and the host railroads are free to reject those demands or, in return for agreeing to incorporate some or all of the metrics and standards, to demand changes to compensation and other terms and conditions that Amtrak might decide are impracticable. Significantly, moreover, any failure by Amtrak and a host railroad to negotiate a contract will be resolved by an independent governmental entity (the STB), which is not required to give any deference to the metrics and standards when it "prescribe[s] reasonable terms and compensation." 49 U.S.C. 24308(a)(2)(A)(ii).

There is accordingly no basis for respondent's contention (Br. 23) that Amtrak's role in developing the metrics and standards permitted it to "use regulatory power to [its] own commercial advantage."

d. Respondent similarly errs in contending (Br. 24-26) that Amtrak's participation in developing the metrics and standards permitted the federal government to evade political accountability for their effects. Even setting aside the extensive governmental control over and ties with Amtrak (see pp. 13-15, *infra*), Section 207 plainly prevents the government from disclaiming responsibility for the metrics and standards, because the FRA itself had to approve them. Moreover, the FRA did so in a transparent process that involved solicitation of, and response to, comments from various stakeholders. See J.A. 11-158 (reprinting proposed metrics and standards, *Federal Register* notices, and published responses to comments). And we have already explained that, to the extent that the

metrics and standards themselves were somehow to become the basis for a future STB order to pay damages, they could be subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* See Gov't Br. 37 n.15.

e. Finally, Section 207 is not rendered unconstitutional, as respondent suggests (Br. 21-22), because Congress has not used the same mechanism in other contexts or because the government has failed to show that joint development of the metrics and standards was the "only" way to achieve Congress's goals. Congress understandably gave Amtrak a greater role than other stakeholders in preparing the metrics and standards that would be used primarily to measure Amtrak's own performance. See Gov't Br. 7-8; cf. *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 552 (1935) (Cardozo, J., concurring) ("When the task that is set before one is that of cleaning house, it is prudent as well as usual to take counsel of the dwellers."). But the question for this Court is not whether Congress took the only possible course. As in most constitutional contexts, a successful defense of the statute does not require the government "to demonstrate that its [actions] are 'necessary' or the least restrictive means of furthering its interests." *NASA* v. *Nelson*, 131 S. Ct. 746, 760 (2011).

In any event, whether or not it made manifestly better sense at the outset to require joint development rather than mere consultation with Amtrak, it is now obvious that PRIIA's purposes would be much better served if the metrics and standards could be put back into effect without requiring Congress to amend the statute to provide for their adoption through some different mechanism.

3. The potential for a government-appointed arbitrator avoided any nondelegation problem

As discussed above, Section 207(a) of PRIIA provided that the FRA and Amtrak would "jointly * * * develop" the Amtrak-performance metrics and standards. 49 U.S.C. 24101 note. Section 207(d) further provided that, if there were an impasse in promulgating the metrics and standards, *any* party involved in their development could "petition the [STB] to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." *Ibid.* If that provision is construed as referring to a governmental arbitrator, then there would have been no doubt that the last word about the metrics and standards would come from a governmental entity (and not Amtrak). See Gov't Br. 27-29. Respondent, however, contends (Br. 26) that the arbitrator "provision, in and of itself, renders Section 207 unconstitutional," because it must be read as contemplating the appointment of a *private* arbitrator. Respondent's reading is not supported by the statutory text, the context, or applicable principles of statutory construction.

a. Respondent asserts (Br. 27) that "the ordinary meaning of the word 'arbitrator' refers to a *nongovernmental* actor." But the definition in *Black's Law Dictionary* 120 (9th ed. 2009), includes no such limitation, and, with one exception, none of the sources respondent cites even involved a statutory reference to an arbitrator.[2] The exception shows that Congress

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[2] In *Gordon* v. *United States*, 74 U.S. (7 Wall.) 188 (1868), the Court concluded that the Secretary of War had not been an arbitrator because he had not been invested with authority to make a final decision binding on the parties—not, as respondent suggests, because he was not "a private extraordinary judge." *Id.* at 194

can indeed provide for arbitration by a government official. See 7 U.S.C. 1359ff(a)(2)(A) (arbitration by the Secretary of Agriculture of disputes about sugar marketing allotments). And respondent does not deny that PRIIA and other statutes already contemplate that other disputes involving Amtrak will be resolved by the STB rather than a private entity. See Gov't Br. 28. There is therefore no reason to conclude that Section 207(d)'s reference to an "arbitrator" appointed by the STB means a non-governmental actor—especially in light of the presumption against "subdelegations to outside parties," *United States Telecom Ass'n* v. *FCC*, 359 F.3d 554, 565 (D.C. Cir.), cert. denied, 543 U.S. 925 (2004), which respondent does not contest.

(citation omitted). The joint resolution at issue in *Gordon* did not use any form of the term "arbitrator." Res. of June 1, 1860, 12 Stat. 873. Respondent also cites (Br. 27) two opinions of the Office of Legal Counsel. One noted that arbitrators are typically "private individuals chosen by the parties to the dispute," *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 148 (1996)—a definition that is plainly inapplicable to Section 207(d), where the arbitrator is chosen *by the STB*. The second opinion considered whether a hypothetical statute might "compel [a federal agency's] litigation counsel to enter into binding arbitration" by a private arbitrator. *Constitutional Limitations on Federal Government Participation in Binding Arbitration*, 19 Op. O.L.C. 208, 208-209 (1995). But the opinion acknowledged that there are no "universally applicable rules" governing arbitration, *id.* at 209, and it relied on a decision from this Court about a statute that allowed a customs collector to have an import duty jointly appraised either by two private merchants or by *a government appraiser* and a private merchant, *id.* at 217. See *Auffmordt* v. *Hedden*, 137 U.S. 310, 312, 326-327 (1890).

b. At the very least, Section 207(d) cannot be read as unambiguously *precluding* a governmental arbitrator. That eliminates the only basis for respondent's objection (Br. 28-29) to applying the canon of constitutional avoidance in support of the governmental reading.[3] In fact, the Court has long been willing to infer, for constitutional purposes, a limitation that is not expressly contained in the statutory text but is nevertheless a plausible reading. See, *e.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678, 682 (2001) (construing statute authorizing detention of certain removable aliens "beyond the removal period" as "contain[ing] an implicit 'reasonable time' limitation"); *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 70-72 (1994) (discussing Court's willingness to infer or expand scienter requirements to prevent punishment of otherwise-innocent conduct); *The Abby Dodge*, 223 U.S. 166, 173, 177 (1912) (construing "the waters of the Gulf of Mexico or the Straits of Florida" as excluding waters within "the territorial limits of a State"); *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (construing the words "any person or persons" as excluding foreign citizens on foreign ships on the high seas).

Here, reading Section 207(d)'s reference to a government-appointed "arbitrator" as being limited to a governmental arbitrator does not "press statutory

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[3] See *Stern* v. *Marshal*, 131 S. Ct. 2594, 2605 (2011) (concluding that "the plain text" left no "room for the canon of avoidance"); *Salinas* v. *United States*, 522 U.S. 52, 60 (1997) (finding "[t]he text" to be "unambiguous on the point under consideration"); *United States* v. *Monsanto*, 491 U.S. 600, 611 (1989) (concluding that "the language is clear and the statute comprehensive"); see also *United States* v. *Stevens*, 559 U.S. 460, 481 (2010) (declining to adopt a limiting construction in light of the standards applicable to facial overbreadth challenges in the First Amendment context).

construction to the point of disingenuous evasion." *United States* v. *Locke*, 471 U.S. 84, 96 (1985) (internal quotation marks and citation omitted). It requires no greater departure from the plain text than respondent's own "private arbitrator" reading (Br. 26), and it comports with the Court's established practice of using construction to avoid, rather than create, any constitutional concern.[4]

B. Amtrak Should Not Be Considered A "Private" Entity For Purposes Of Nondelegation Analysis

Respondent's nondelegation claim is fundamentally misguided for the further reason that Amtrak should not be considered a private entity for purposes of nondelegation analysis.

1. Respondent does not deny the federal government's multiple and extensive forms of control over Amtrak. As detailed in our opening brief (at 42-46), Congress has not simply chartered Amtrak and

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[4] There is no merit to respondent's further suggestion (Br. 29) that the use of a governmental arbitrator would violate the Appointments Clause (U.S. Const. Art. II, § 2, Cl. 2). Even assuming that the arbitrator's authority, confined to the single impasse over the metrics and standards, to "assist the parties in resolving their disputes through binding arbitration," 49 U.S.C. 24101 note (PRIIA § 207(d)), would constitute the "performance of a significant governmental duty," *Buckley* v. *Valeo*, 424 U.S. 1, 141 (1976) (per curiam), the limited nature of that duty would allow the arbitrator to be an inferior, rather than principal, officer. See *Edmond* v. *United States*, 520 U.S. 651, 661-662 (1997). While Section 207(d) does not explicitly address the authority to remove the arbitrator (see Resp. Br. 29-30), it is implicit in the appointment power. See *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010); *Keim* v. *United States*, 177 U.S. 290, 293 (1900). The arbitrator's appointment by the STB would therefore comport with the Appointments Clause.

turned it loose to make profits. It has prescribed Amtrak's mission and various public-interest goals—often at a striking level of detail.[5] Gov't Br. 4-5, 7 n.4; see *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995) ("Amtrak was created by a special statute, explicitly for the furtherance of federal governmental goals."). Congress has retained federal ownership of all of Amtrak's preferred stock and has retained governmental control over Amtrak's management by, among other things, providing for presidential appointment (subject to the Senate's advice and consent) of nearly all of Amtrak's Board of Directors. Gov't Br. 43-45.[6] Not least—having long since

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[5] The most recent bill authorizing appropriations for Amtrak, which was favorably reported by the House Committee on Transportation and Infrastructure on September 17, 2014, conforms to Congress's pattern of micromanagement; accompanying provisions would require Amtrak, among other things, to establish a "pilot program that allows passengers to transport domesticated cats or dogs on certain trains." H.R. 5449, 113th Cong., 2d Sess. § 210(a).

[6] Respondent incorrectly suggests (Br. 42) that the selection of Amtrak's directors does not comport with the Appointments Clause. The only one of Amtrak's nine directors who is not appointed by the President with the advice and consent of the Senate is Amtrak's own President, who is appointed by the other eight directors, has his salary fixed by the remaining directors, and "serve[s] at the pleasure of the board." 49 U.S.C. 24303(a) and (b). Amtrak's President is therefore an inferior officer. See *Free Enter. Fund*, 561 U.S. at 510 (noting that "'[t]he power to remove officers' at will and without cause 'is a powerful tool for control' of an inferior") (quoting *Edmond*, 520 U.S. at 664). As such, he may be appointed by the other eight directors. See *id.* at 510-513 (approving appointments by the SEC Commissioners, considered as a collective Head of a Department that is not subordinate to or contained within any other component of the Executive Branch); *Silver* v. *United States Postal Serv.*, 951 F.2d 1033, 1036-1041 (9th Cir. 1991) (rejecting Appointments Clause challenge to the Board

acknowledged that "Amtrak is not a for-profit corporation," H.R. Rep. No. 1182, 95th Cong., 2d Sess. 15 (1978)—Congress has furnished more than $41 billion in subsidies to Amtrak over 43 years. Gov't Br. 45-46.

Respondent cannot avoid those structural and operational realities by pointing to Congress's declaration that Amtrak "shall be operated and managed as a for-profit corporation," or that it is not a federal "department, agency, or instrumentality." 49 U.S.C. 24301(a)(2) and (3). What respondent calls (Br. 39) "Congress's 'statutory disavowal' of Amtrak's agency status" did not, as respondent suggests (Br. 42), require Congress to choose between making Amtrak a traditional agency with rulemaking authority subject to the Administrative Procedure Act and making it a wholly private non-agency. Congress is free to pick and choose among statutory obligations and powers. Thus, the APA is inapplicable to some indisputably governmental entities (like Congress and this Court) and to some legislative rules made by federal agencies. See 5 U.S.C. 551(1), 553(a). And, with respect to Amtrak itself, Congress has expressly exempted it from some of the statutory requirements that generally apply to governmental agencies (such as Title 31 of the United States Code, which includes the False Claims Act) but subjected it to others (such as the Freedom of Information Act and the Inspector General Act). See Gov't Br. 39-40.

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of Postal Governors, which consisted of nine individual Governors (appointed by the President with the advice and consent of the Senate), the Postmaster General (appointed by the nine Governors), and the Deputy Postmaster General (appointed by the nine Governors and the Postmaster General)).

There is accordingly no basis for respondent's contention (Br. 35-36) that Congress's decision to deprive Amtrak of sovereign immunity from suit simultaneously requires it to have made Amtrak a private actor for purposes of participating in the development of the metrics and standards. Congress has waived sovereign immunity for certain entities without also depriving them of their governmental status for purposes of exercising even true regulatory authority. See, *e.g.*, 12 U.S.C. 1701c(a) and 1702 (authorizing the Secretary of Housing and Urban Development to "make such rules and regulations as may be necessary to carry out his functions, powers, and duties," and providing that he may, "in his official capacity," "sue and be sued"); 39 U.S.C. 401(1) and (2) (waiving the Postal Service's sovereign immunity while simultaneously giving it the authority "to adopt, amend, and repeal such rules and regulations * * * as may be necessary in the execution of its function under this title"). Nor is this Court's decision in *Bank of the United States* v. *Planters' Bank*, 22 U.S. (9 Wheat.) 904 (1824), to the contrary.[7]

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[7] In *Bank of the United States*, the Court concluded that "[t]he State of Georgia, by giving to [a state-chartered] Bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transaction of the Bank, and waives all the privileges of that character." 22 U.S. (9 Wheat.) at 907-908. The Court said the same had been true with respect to "the old Bank of the United States," in which the federal government merely held shares, without otherwise "impart[ing]" to it "the privileges of the government." *Id.* at 908. Neither of those propositions is in tension with the conclusion that a statutorily created entity subject to multiple forms of governmental control can, if Congress wishes, exercise governmental authority subject to Congress's direction.

2. The critical point is that the latitude permitted to Congress under the nondelegation doctrine is defined by the Constitution, not statute. As *Lebron* concluded, Amtrak is a governmental agency or instrumentality for the purpose of individual rights guaranteed by the Constitution. See 513 U.S. at 394. That reasoning extends to the nondelegation doctrine, which, like other structural provisions of the Constitution, also serves to protect individual liberty. Gov't Br. 40-41. If Amtrak is governmental "for purposes of the constitutional *obligations* of the Government" (as respondent concedes, Br. 35), then the Constitution does not prevent Congress from treating it as governmental to the extent that Congress chooses to make an otherwise-permissible grant of authority to it.

C. The Court Should Decline To Decide, Or Should Reject, Respondent's Due-Process Claim

When it granted certiorari, the Court did not include respondent's additional question (Br. in Opp. i, 20-23) about its claim under the Due Process Clause. Nevertheless, respondent again advances (Br. i, 43-50) that claim as an independent basis for invalidating Section 207. The Court should decline to decide that question in the first instance or, in any event, should reject it on the merits.

1. The court of appeals should address respondent's due-process claim in the first instance

As the Court often observes, it is "a court of final review and not first view," and it therefore does not ordinarily "decide in the first instance issues not decided below." *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) (citations omitted). That practice carries

special force in the context of constitutional questions that have not been addressed by the court of appeals. See, *e.g.*, *ibid.*; *Bond* v. *United States*, 131 S. Ct. 2355, 2360, 2367 (2011); *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

In this case, the same result follows from the Court's well-established practice of declining to address issues that are not fairly included within the scope of the questions on which the Court granted certiorari. See *Cutter*, 544 U.S. at 727 n.2 (Thomas, J., concurring); *Lebron*, 513 U.S. at 379; Sup. Ct. R. 14.1(a). The Court did not add respondent's due-process question when it granted the government's petition for certiorari. Cf. *NLRB* v. *Noel Canning*, 133 S. Ct. 2861, 2861-2862 (2013). The Court should again decline the request to address that question.

Adhering to the Court's usual practices would be particularly appropriate in this case, because the basis for respondent's due-process claim has markedly shifted since it was rejected by the district court.[8]

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[8] The district court held that, for purposes of the Due Process Clause, Amtrak is a "governmental entity" rather than a "private entity." Pet. App. 34a-35a. Respondent now contends (Br. 49-50) that its due-process claim does not "depend[] on a determination that Amtrak is a private actor," because the claim "was framed broadly" in its complaint. Respondent quotes one sentence from its complaint, which said that "Section 207 of PRIIA violates the due process rights of the freight railroads" by vesting power in Amtrak. Resp. Br. 50 (quoting J.A. 177). But the complaint's preceding sentence articulated respondent's proposed rule, demonstrating that its due-process claim was predicated on Amtrak's purportedly private status. J.A. 177 ("Vesting the coercive power of the government in interested *private parties* violates the due process rights of regulated third parties, as secured by the Fifth

Accordingly, if this Court reverses the court of appeals' holding with respect to respondent's nondelegation claim (*i.e.*, the question on which it granted certiorari), it should remand for further proceedings in which respondent could pursue its due-process claim in the light shed by the Court's analysis of the operation of Section 207 and of Amtrak's public or private status for nondelegation purposes. See *United States* v. *Comstock*, 560 U.S. 126, 149-150 (2010).

2. If this Court reaches the question, it should reject respondent's due-process claim

In any event, respondent's due-process claim fails on the merits.

a. Relying principally on *Carter Coal*, respondent contends that the Due Process Clause prevents a self-interested entity from wielding "the power to regulate the business of another, and especially of a competitor." Resp. Br. 44 (quoting *Carter Coal*, 298 U.S. at 311). As discussed above (see pp. 5-9, *supra*), however, Amtrak's authority to act jointly with the FRA in developing the metrics and standards is not properly characterized as regulatory power. Nor is Amtrak's position *vis-à-vis* the host railroads like that of a mar-

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Amendment to the United States Constitution.") (emphasis added); see also Resp. Mem. in Supp. of Its Mot. for Summ. J. 32, D. Ct. Doc. 8 (Dec. 2, 2011) ("Delegations to *private parties* are unconstitutional for the additional and independent reason that such delegations violate the due process rights of regulated third parties.") (emphasis added); Resp. Reply in Supp. of Its Mot. for Summ. J. & Opp. to Pet. Mot. for Summ. J. 26, D. Ct. Doc. 13 (Mar. 6, 2012) ("[G]ranting *a private corporation* 'the power to regulate the business of another, and especially of a competitor' is 'clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment.'") (quoting *Carter Coal*, 298 U.S. at 311-312) (emphasis added).

ket competitor. Rather, Amtrak is more like "a customer of a common carrier that cannot refuse to furnish a service to the customer at the approved rate." Gov't Br. 24 n.7. And all else aside, even a self-interested and truly private party may trigger an investigation by an independent and indisputably disinterested governmental agency like the STB without running afoul of the Due Process Clause. Any other rule would proscribe most of the claims that private parties routinely bring before most administrative agencies or courts.

Indeed, to the extent that respondent seeks to differentiate its due-process claim from its nondelegation claim, it does so principally by citing a line of cases in which the Court has been punctilious about requiring *adjudicators* to be disinterested. See Resp. Br. 44 (citing *Tumey* v. *Ohio*, 273 U.S. 510 (1927); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *Gibson* v. *Berryhill*, 411 U.S. 564 (1973)).[9] As the Court has explained, "[t]he rigid requirements of *Tumey* and *Ward*" were "designed for officials performing judicial or quasi-judicial functions" and were inapplicable to agency officials seeking to enforce the law before an independent adjudicator. *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 248 (1980); see also *Concrete Pipe & Prods. of Calif., Inc.* v. *Construction Laborers Pen-*

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[9] Respondent also cites (Br. 44) *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), which relied upon the Court's supervisory power, not the Due Process Clause, and held that the power to prosecute a criminal contempt could not be exercised by someone who was required by principles of legal ethics to represent an interest other than that of the public. *Id.* at 807-809.

sion Trust, 508 U.S. 602, 619 (1993) (reaffirming "[t]he distinction between adjudication and enforcement").

In *Marshall*, the Court rejected the proposition that an agency official was insufficiently disinterested to bring an administrative enforcement action seeking monetary penalties for the unlawful employment of child labor, when any recovery would be retained by the agency to defray administrative costs. 446 U.S. at 241, 246-250. Without determining "with precision" what leeway would be allowed to those bringing an enforcement action before a disinterested adjudicator, the Court concluded that the likelihood that the agency official would act in a biased fashion was sufficiently remote because his salary was fixed and the budgetary consequences for the agency were minimal. *Id.* at 250-252.

b. Here, the only potential adjudicatory body is the STB, which would determine whether a host railroad had failed to provide the statutorily required preference for intercity-passenger-rail traffic (49 U.S.C. 24308(f)(2)), or would "prescribe reasonable terms and compensation" in the event that Amtrak and a host railroad could not agree on new contract terms (49 U.S.C. 24308(a)(2)(A)(ii)). Even assuming that the process of developing the metrics and standards constituted a rulemaking function, it would still satisfy the standard applied in *Marshall*. Although respondent asserts (Br. 45-46) that Amtrak's officers have a "strong private financial incentive to maximize Amtrak's profits," that incentive derives from a statutory provision that would apply only in years during which Amtrak does not receive federal assistance, 49 U.S.C. 24303(b). Given Amtrak's unbroken string of unprofitability, that cannot have been a realistic inducement

to biased decisionmaking. And, to the extent that Amtrak itself might stand to recover damages for a violation of the statutorily required preference, 49 U.S.C. 24308(f)(2), they would not go to the corporation's general fund; they could be used only "for capital or operating expenditures on the routes over which delays" resulted from the statutory breach, 49 U.S.C. 24308(f)(4).

c. Finally, it is noteworthy that—unlike the statute invalidated in *Carter Coal*—Section 207 did not give Amtrak a unilateral ability to adopt the metrics and standards. Their development required the active participation and approval of the FRA, a neutral governmental agency as to which plaintiff makes no claim of bias. Under the circumstances, Amtrak's role in developing the metrics and standards was not at all akin to "[e]mpowering Burger King to regulate McDonald's." Resp. Br. 48. If it decides to reach the question, the Court should reject respondent's due-process claim.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

OCTOBER 2014

AMICUS CURIAE BRIEF

No. 13-1080

In the Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,
Petitioners,

v.

ASSOCIATION OF AMERICAN RAILROADS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL OF TRUSTEES AND ALUMNI, THE JOHN WILLIAM POPE CENTER FOR HIGHER EDUCATION POLICY, AND JUDICIAL EDUCATION PROJECT IN SUPPORT OF RESPONDENT

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Keeping College Within Reach: Discussing Program Quality through Accreditation: Hearing Before the Subcomm. on Higher Educ. and the Workforce, Comm. on Educ. and the Workforce, 113th Cong. (June 13, 2013) (Testimony of Anne D. Neal), *available at* http://www.goacta.org/images/download/NealTestimony6-13-13.pdf 35

STATEMENT OF INTEREST

Amici curiae[1] are non-profit organizations with an interest in the continued vitality of the private nondelegation principle at issue in this case. Specifically, *amici* are concerned about unchecked legislative authority in the hands of unaccountable private parties. *Amici*'s interest in this issue is not merely theoretical, but stems from experience with the federal system of higher education funding. There, wholly private accreditation agencies wield substantial authority to determine and apply standards by which educational institutions and their students qualify for federal funding. Yet this private rulemaking and adjudication is virtually free from independent federal oversight. Further, these private accreditation decisions are largely made by administrators and faculty who work for competing institutions in the education industry and whose institutions benefit from the federal dollars effectively controlled by their accreditation agencies.

The very structure of the system creates the potential for biased and unaccountable decisionmaking.

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[1] The parties have consented in writing to the filing of this brief and copies of their letters of consent are on file with the Clerk's office. Counsel for *amici* authored this brief in its entirety. No party to this case or its counsel authored any part of this brief or contributed money that was intended to fund the preparation or submission of this brief. No person, other than *amici*, their members, and their counsel, contributed money that was intended to fund the preparation or submission of this brief.

As discussed below, the delegation of the control of federal educational benefits to private organizations composed largely of education industry stakeholders creates substantial constitutional problems akin to those posed by the delegation of authority to Amtrak in this case.

Amici curiae believe that the private nondelegation principle applied below provides a critical safeguard against the unsupervised exercise of governmental authority. This private nondelegation principle—properly grounded in the Constitution's separation of powers and due process guarantees—is an important bulwark against delegations of excessive authority to private parties. It ensures that the elected branches of the federal government remain constitutionally accountable for decisions made under federal law and that decisions under federal law are not made by stakeholders in the outcome.

Amicus curiae the American Council of Trustees and Alumni ("ACTA") is an independent, non-profit organization committed to academic freedom, excellence, and accountability at America's colleges and universities. ACTA works with alumni, donors, trustees, and education leaders across the United States to support liberal arts education, uphold high academic standards, safeguard the free exchange of ideas on campus, and ensure that the next generation receives an intellectually rich, high-quality college education at an affordable price. ACTA has a long history of advocacy for accreditation reform in light of the failure of the higher education accreditation system to accomplish its intended purpose of ensuring academic quality.

Amicus curiae the John William Pope Center for Higher Education Policy ("Pope Center") is a 501(c)(3) non-profit institute dedicated to improving higher education. The Pope Center believes that higher education in the United States has strayed from its chief goals of scholarly inquiry and responsible teaching. To address these concerns, the Pope Center conducts studies in areas such as governance, curriculum, financing, access, accountability, faculty research, and administrative policies. It explores ways to increase the accountability of trustees, administrators, faculty, and students. And it engages in the broader dialogue about how to improve higher education around the nation.

Amicus curiae the Judicial Education Project ("JEP") is dedicated to strengthening liberty and justice in America by defending the Constitution as envisioned by its Framers—creating a federal government of defined and limited power, dedicated to the rule of law, and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges construe the Constitution, and the impact of the judiciary on the nation. JEP's education efforts are conducted through various outlets, including print, broadcast, and Internet media. The private nondelegation principle at issue in this case falls squarely within the realm of constitutional concerns that animate JEP.

SUMMARY OF ARGUMENT

The private nondelegation principle, which prohibits the delegation of legislative power to private, non-governmental actors, remains a vital aspect of our constitutional order. Properly described by the court of appeals as a "lesser-known cousin of the doctrine that Congress cannot delegate its legislative function to an agency of the Executive Branch," Pet. App. 7a, this private nondelegation principle serves a pair of constitutional values.[2] First, like the nondelegation doctrine, it reinforces the Constitution's assignment and separation of powers by ensuring that legislative and executive powers are exercised by persons or agencies constitutionally accountable to the electorate. Second, it furthers the guarantee of due process of law by ensuring that governmental authority is vested only in unbiased and disinterested decisionmakers acting for the public good.

These underlying tenets are tested whenever private actors are endowed with federal rulemaking authority. The private decisionmaker delegated federal authority is wholly unaccountable to the electorate for its exercise. At the same time, the political branches are able to disclaim responsibility for the substantive policies that result from the delegation.

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[2] For sake of clarity, *amici* use the phrase "private nondelegation principle" to refer to the question of Congress's power to delegate authority to private parties. This is distinguished from the question of Congress's power to delegate authority within the federal government, which this Court has generally called the "nondelegation doctrine."

These problems are amplified when the ultimate decisionmaker is a private party acting not for the public good, but for its own interests.

The proper role of a private party in legislative rulemaking is circumscribed by Article I's vesting clause, which vests "all legislative Powers herein granted" in Congress. U.S. Const. art. I, § 1. A private party therefore may not, in any circumstance, *make* the law. As this Court famously declared in *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), "[t]his is legislative delegation in its most obnoxious form."

Of course, this Court has recognized that Congress retains sufficient flexibility to account for the myriad economic, social and regulatory challenges it faces as a national legislature. With respect to intragovernmental delegations, this Court seeks to protect Congress's Article I authority by requiring an intelligible principle to guide the governmental official and to ensure that it is Congress, and not the Executive Branch (or other governmental entity), that decides what the law is. But legislative delegations to private entities raise an additional constitutional concern by encroaching not only on Congress's legislative authority but also on the Executive Branch's constitutional duties to apply and enforce the law. Moreover, delegations to private parties lack the same constitutional safeguards as delegations to Executive Branch officials, who are bound by the constitutional oath and are subject to removal and impeachment. As a result, the "intelligible principle" rule is insufficient to preserve the constitutional design and protect individual liberties.

Nevertheless, this Court has made clear that Congress can invite the assistance of private parties in certain aspects of federal rulemaking, provided that Congress, with perhaps the input of the Executive Branch, is always responsible for the fundamental design and content of the law. This Court has recognized two circumstances where a private party's involvement in the rulemaking process does not run afoul of the rule against private delegation.

First, Congress may enlist private parties to act in a subordinate role in regulating under federal law. A private organization may thus act in an advisory capacity to an Executive Branch official in proposing a federal regulation, provided that the ultimate decision regarding the final rule is vested in the governmental actor. *See Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940). In these circumstances, the ultimate responsibility for the *content* of federal law remains with Congress and the Executive Branch (acting pursuant to congressional direction).

Second, Congress may condition the effectiveness of a federal regulation on the consent of a class of regulated parties, as by an industry referendum. *See, e.g.*, *Currin* v. *Wallace*, 306 U.S. 1 (1939) and *United States* v. *Rock Royal Co-op.*, 307 U.S. 533 (1939). Provided that it acts with sufficient clarity, in those circumstances it is again Congress that establishes the contours of federal law. The regulated industry merely satisfies a condition established by Congress on the effectiveness of its legislative policy. It might be said that Congress's conditioning of the effectiveness of federal law on a plebiscite of a regulated industry *reinforces* the democratic accountabil-

ity inherent in the constitutional structure by adding yet another layer of democratic processes to its law-making.

The court of appeals here correctly determined that Congress's delegation to Amtrak did not fall within these safe harbors. Far from playing a subordinate role, Amtrak is a co-equal partner with the federal agency. It "jointly" (with the Federal Railroad Administration) crafts the law that regulates the conduct of other private parties. *See* Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, § 207(a), 122 Stat. 4916.

The statutory scheme is also unlike the permissible referendum process. It subjects governmental regulation to the approval of a single regulated party and gives that private party an equal hand in crafting its content. While the Department of Transportation has *some* shared responsibility for the guidelines, even that can be divested if Amtrak calls for arbitration. In that circumstance, the statute permits the relevant metrics and standards to be set by a private arbitrator unfettered from governmental control. Ultimately, then, the statutory scheme lacks the earmarks of secretarial control necessary to confine the delegation of authority.

The statutory scheme equally fails the guarantee of due process. Amtrak is a stakeholder in the rail transportation industry, which competes with freight railroads for the limited availability of tracks. Yet Amtrak sets standards that affect the conduct of those freight railroads. These same concerns for guarding against possible bias animated *Carter Coal* and numerous due process cases that followed.

This case demonstrates the continuing utility of the private nondelegation principle in reinforcing the constitutional structure, promoting constitutional accountability, and protecting individual liberties. There are good reasons for this Court to reaffirm the limitations on Congress's power to assign legislative responsibility to private parties. Indeed, while Congress has generally observed the safeguards against private lawmaking, *amici curiae*'s experience with an unrelated statutory scheme—the Higher Education Act—illustrates the need for continued vigilance.

Under the Higher Education Act, Congress has granted to private accreditation agencies broad unreviewable authority to establish accreditation standards by which educational institutions' eligibility for federal funding is determined. By both setting and applying the standards by which universities and other educational institutions qualify for federal funding, accreditors effectively decide whether those educational institutions live or die. But as with the instant case, the accreditation scheme lacks sufficient oversight and control, resulting in unchecked and increasingly arbitrary accreditation standards and decisions. While this case obviously examines a different scheme, *amici*'s experience with the accreditation system further demonstrates that a vibrant check on private delegations is warranted in modern jurisprudence.

ARGUMENT

I. THE PRIVATE NONDELEGATION PRINCIPLE PROMOTES THE CONSTITUTIONAL ASSIGNMENT AND SEPARATION OF POWERS AND PROTECTS AGAINST BIASED DECISIONMAKING

Nearly 80 years ago this Court declared that the delegation of legislative power to private entities "is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress." *A.L.A. Schechter Poultry Co.* v. *United States*, 295 U.S. 495, 537 (1935).[3] A year later, the Court held unconstitutional a federal law empowering a private coal board composed of industry participants to set rules governing the conduct of others in the industry. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311-

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[3] In *Schechter*, the Court ultimately invalidated the delegation at issue because Congress established no guidelines for the President's approval of codes of conduct that were drafted by private industry. *See* 295 U.S. at 537-42. Prior to tackling the issue of whether Congress had properly delegated authority to an Executive Branch official, the Court had no trouble concluding that a straight delegation to an industry association (in the absence of a presidential approval role) would have been unconstitutional, reasoning that it cannot "be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries." *Id.* at 537. Nor "[c]ould trade or industrial associations or groups be constituted legislative bodies for that purpose" simply "because such associations or groups are familiar with the problems of their enterprises." *Id.*

12 (1936). This vesting of rulemaking power in an interested private party is "delegation in its most obnoxious form." *Id.* at 311. Regulation of this economic activity is "necessarily a governmental function, since, in the very nature of things, one person may not be intrusted with the power to regulate the business of another, and especially of a competitor." *Id.*

While this Court has not since invalidated a statute under *Carter Coal*, the private nondelegation principle is not simply a remnant of a by-gone constitutional era. *See Mistretta* v. *United States*, 488 U.S. 361, 374 n.7 (1989) (distinguishing *Schechter* on grounds that statute authorizing U.S. Sentencing Commission to create sentencing guidelines does not "delegate regulatory power to private individuals"). It is instead grounded in enduring constitutional precepts. First, it protects and promotes the constitutional assignment and separation of powers and the attendant political accountability to the people. Second, it reinforces due process protections against potential bias and self-interest in the determination and application of federal law. In both respects, the private nondelegation principle safeguards individual liberties.

A. The Private Nondelegation Principle Ensures Political Accountability to the Electorate

1. Like the Nondelegation Doctrine, the Private Nondelegation Principle Reinforces the Constitutional Structure

Carter Coal cited the Fifth Amendment's due process clause in support of its ruling, *see* 298 U.S. at 311, but also relied on *Schechter*'s rule against delegations of legislative power to a private entity. That decision grounded its concerns about delegation to private parties in the "constitutional prerogatives and duties of Congress." *Schechter*, 295 U.S. at 537. From its origins, then, the private nondelegation principle was firmly grounded in the Constitution's assignment and separation of powers. *See id.* at 529 ("The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.").[4]

In this critical respect, the private nondelegation principle is like its better-known "cousin," Pet. App.

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[4] Indeed, modern commentary understands—just as both lower courts did here, *see Ass'n of American Railroads* v. *Department of Transportation*, 865 F. Supp. 2d 22, 33 (D.D.C. 2012), *judgment rev'd*, 721 F.3d 666 (D.C. Cir. 2013); *see also* Pet. App. 7a—the private nondelegation principle to stem, in large part, from the constitutional separation of powers. *See, e.g.*, Harold J. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 U. Miami L. Rev. 507, 510 (2011).

7a, the nondelegation doctrine, which limits Congress's power to delegate authority to the Executive Branch or other entities within the federal government. *See, e.g.*, *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Both doctrines rest on the Constitution's carefully delineated structure, which vests the two coordinate political branches with the authority to determine the contents and execution of the law. But by prohibiting the delegation of governmental power outside the federal government, the private nondelegation principle goes a step further than the better-known nondelegation principle. It protects not only congressional prerogatives, but executive prerogatives as well.

The intra-governmental nondelegation doctrine "developed to prevent Congress from forsaking its duties." *Loving* v. *United States*, 517 U.S. 748, 758 (1996). In particular, Article I, § 1, declares that "All legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const., art. I, § 1. Thus, the "fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, and may not be conveyed to another branch or entity." *Loving*, 517 U.S. at 758 (citation omitted).[5]

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[5] *See also Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."); *Whitman*, 531 U.S. at 472 ("[T]he constitutional question is whether the statute has delegated legislative power

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The Constitution vests Congress with this sole responsibility for lawmaking because it is the branch most accountable to the electorate: "By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable." *Loving*, 517 U.S. at 757. "The clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance." *Id.* at 758.[6] As the "branch of our Government most responsive to the popular will," Congress is directly accountable to the American people for its legislative policy choices. *Indus. Union Dep't, AFL-CIO* v. *Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring).

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to the agency . . . [The Constitution's] text permits no delegation of those powers.").

[6] *See also Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010) ("Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'") (quoting *The Federalist*, No. 70, at 476 (Alexander Hamilton)); *see also Bowsher* v. *Synar*, 478 U.S. 714, 738 n.1 (1986) ("If there be one principle clearer than another, it is this: that in any business, whether of government or of mere merchandising, *somebody must be trusted*, in order that when things go wrong it may be quite plain who should be punished . . . . *Power and strict accountability of its use* are the essential constituents of good government.") (omission in original) (internal quotation marks and citation omitted).

The private nondelegation principle is equally grounded in this concern for congressional abdication of legislative authority. In this sense, both doctrines are "rooted in the principle of separation of powers that underlies our tripartite system of Government." *See Mistretta*, 488 U.S. at 371.[7] They rest on the fundamental premise that *any* transfer of *core legislative functions* outside of Congress is prohibited by the Constitution. "[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power." *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 405-06 (1928).

Where Congress seeks to delegate authority entirely outside of government, the concern becomes not simply Congress's abdication of its own legislative responsibility, but also its undermining the Executive Branch's authority to execute the law. Article II, like Article I, vests *all* of the executive authority in the President. *See, e.g., Touby* v. *United States*, 500 U.S. 160, 168 (1991). Congress under-

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[7] *See also Loving*, 517 U.S. at 758 ("[T]he delegation doctrine[ ] has developed to prevent Congress from forsaking its duties."); Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L. J. 1399, 1416-17 (2000) ("The nondelegation doctrine promotes separation of powers by forcing Congress to make the hard choices rather than allowing it to delegate such responsibility to the executive branch.").

mines the Executive Branch's authority to administer the law when it delegates rulemaking authority entirely outside of government. As one lower court explained, then, the private "nondelegation principle serves both to separate powers as specified in the Constitution . . . and to retain power in the governmental Departments so that delegation does not frustrate the constitutional design." *Pittston Co.* v. *United States*, 368 F.3d 385, 394 (4th Cir. 2004).

The accountability promoted by the separation of powers in general, and the private nondelegation principle in particular, protects individual liberty. "The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty." *Boumediene* v. *Bush*, 553 U.S. 723, 742 (2008); *see also Nat'l Labor Relations Bd.* v. *Canning*, 134 S. Ct. 2550, 2559-60 (2014) ("the separation of powers can serve to safeguard individual liberty") (citation omitted).[8] A statute that thwarts this principle of accountability cannot stand.

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[8] *See also Bond* v. *United States*, 131 S. Ct. 2355, 2365 (2011) ("[T]he dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well."); *Loving*, 517 U.S. at 756 ("Even before the birth of this country, separation of powers was known to be a defense against tyranny"); *United States* v. *U.S. Dist. Ct. for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 317-18 (1972) (noting "our basic constitutional doctrine that individual freedoms will best be

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2. Private Delegations Are Not Saved by Congress's Articulation of an Intelligible Principle

For similar reasons, purely private delegations are not saved from invalidity by Congress's articulation of an "intelligible principle" to guide a non-governmental actor's decisionmaking. *See Whitman*, 531 U.S. at 472 ("[W]hen Congress confers decisionmaking authority upon agencies[,] Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'") (last alteration in original) (citation omitted).

The "intelligible principle" rule, which affords broad deference to congressional delegations of authority within the federal government, is grounded in the "inherent necessities of the governmental coordination" in our constitutional system. *See J.W. Hampton*, 276 U.S. at 406. In purely intra-governmental delegations, Congress establishes the broad contours of legislative policy by articulating an intelligible principle. This permits the Executive Branch, as Chief Justice Marshall famously noted, to "fill up the details." *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) (affirming the power of Congress to permit the judiciary to establish rules of judicial practice); *see also Yakus* v. *United States*, 321 U.S. 414, 424-25 (1944) (the Constitution "does not

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preserved through a separation of powers and division of functions among the different branches and levels of Government").

require that Congress find for itself every fact upon which it desires to base legislative action" nor deny Congress the power to "direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command").

Allowing a co-equal branch to define the specifics of a regulation to be applied in certain factual circumstances flows naturally from the "'certain degree of discretion, and thus of lawmaking, [that] inheres in most executive or judicial action.'" *Whitman*, 531 U.S. at 475 (quoting *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting)); *see also Touby*, 500 U.S. at 165. "Separation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes." *Loving*, 517 U.S. at 773; *see also Mistretta*, 488 U.S. at 372 (separation of powers "do[es] not prevent Congress from obtaining the assistance of its coordinate Branches").

That same degree of flexibility does not attach to delegations to private parties outside the federal government. *See* Pet. App. 8a ("Even an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority."). Where the delegation is to a person outside the government, the accountability safeguards inherent in intra-governmental delegations do not accompany the del-

egation.[9] A purely private party is not, like an Executive Branch official, subject to impeachment by Congress. *See* Krent, *supra* note 4, at 523 ("The checks of the Appointments and Impeachment Clauses cannot easily be reconciled with delegations to private parties."). Nor are any such nongovernmental actors required to take the oath to support the Constitution, which binds every state and federal legislator as well as all executive and judicial officers. U.S. Const. art. VI, cl. 3; Krent, *supra* note 4, at 523. Without these and related structural controls, an intelligible principle does not constrain private actors in the same way it does governmental actors. Thus, an intelligible principle is not sufficient to safeguard democratic accountability with respect to those private delegations.

At bottom, whether or not accompanied by an intelligible principle, delegations to private parties raise the danger cited by Justice Scalia in his *Mistretta* dissent. The lack of accountability permits Congress and the Executive Branch to insulate themselves from difficult and volatile political issues:

> I foresee all manner of "expert" bodies, insulated from the political process, to which Congress will delegate various

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[9] Article I permits Congress to authorize private action in just one place—in recognizing Congress's power to issue Letters of Marque and Reprisal. *See* U.S. Const. art. I, § 8, cl. 11. But such decrees "more closely resemble[] an authorization for a private cause of action rather than a delegation of decisional authority." Krent, *supra* note 4, at 524.

> portions of its lawmaking responsibility. How tempting to create an expert Medical Commission (mostly M.D.'s, with perhaps a few Ph.D.'s in moral philosophy) to dispose of such thorny, "no win" political issues as the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research. *This is an undemocratic precedent that was set—not because of the scope of the delegated power, but because its recipient is not one of the three Branches of Government.*

Mistretta, 488 U.S. 422 (Scalia, J., dissenting) (emphasis added). The private nondelegation principle permits a government that "benefits from expertise without being ruled by experts." *Free Enterprise*, 130 S. Ct. at 3156 (emphasis added). It does so by preserving the ultimate decisional authority in *governmental* actors because "[o]ur Constitution was adopted to enable the people to govern themselves, through their elected leaders." *Id.*

B. The Private Nondelegation Principle Protects against Biased Decisionmaking by Self-Interested Parties

Procedural due process limitations on biased decisionmaking also underlie the private nondelegation principle. *See, e.g.*, Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. Pa. L. Rev. 1513, 1553 (1991). As one commentator explains, although the rule "arose out of a perceived need to preserve the separation of governmental powers, the concerns

that the doctrine is intended to address are, at bottom, procedural due-process concerns." *Id.* These "procedural requirements and separated powers are simply different limitations on the exercise of government power, sharing a common goal: to restrict arbitrary government action that is likely to harm the rights of individuals." *Id.* at 1556.

This Court's due process decisions have long been concerned with protecting governmental decisions from the unfair effect of an interested or biased decisionmaker. Thus, the Court has frequently struck down adjudications by persons or groups with a potential stake in the outcome of a particular controversy. *See, e.g.*, *Tumey* v. *Ohio*, 273 U.S. 510 (1927); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *Gibson* v. *Berryhill*, 411 U.S. 564 (1973). "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975) (citation omitted). The Court has been sensitive, in particular, to the "potential for private interest to influence the discharge of public duty." *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805 (1987) (reversing contempt convictions secured by private parties and noting the concomitant dangers of self-interested prosecution by a private party).

Carter Coal merely applied this essential due process protection in the realm of government regulation. *Carter Coal* reasoned that "one person may not be intrusted with the power to regulate the business of another, and especially of a competitor." 298 U.S. at 311. A private lawmaker's interests "may be and

often are adverse to the interests of others in the same business." *Id.*[10] Thus, one cannot assume that a private actor will approach a public duty with the same "presumptively disinterested" view as a government actor. *See id.* To the contrary, there is a significant danger that the private party will serve its own interests and not the public good. *See, e.g.*, *Young*, 481 U.S. at 806.

Carter Coal thus concluded that "a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property." *Carter Coal Co.*, 298 U.S. at 311. The decision guards the well-accepted principle that "[g]overnmental decisions can only be considered fair or impartial if undertaken by officials who are not self-interested." Krent, *supra* note 4, at 527.

C. Private Parties May Play Only Limited Roles in Federal Rulemaking

Cognizant of the dangers of unchecked legislative authority in the hands of private parties, this Court's decisions have long prohibited Congress from "abidicat[ing], or . . . transfer[ing] to others, the es-

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[10] A decisionmaker need not exhibit actual bias to trigger due process concerns; rather, the question is whether there is a *potential* for bias. *See, e.g.*, *Caperton* v. *A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881 (2009) ("The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'").

sential legislative functions with which it is vested by the Constitution." *Currin v. Wallace*, 306 U.S. 1, 15 (1939). But because the Constitution also recognizes that "legislation must often be adapted to conditions involving details with which it is impracticable for the legislature to deal directly," *id.*, the Court has acknowledged a limited role for private parties to assist in spelling out the contours of federal regulation. The operative cases fall into one of two categories. In either circumstance, the Constitution assures that it is Congress, and not private parties, that "make the law." *Id.*

The first category of permissible private involvement is where private parties are enlisted by Congress in a function subordinate to the ultimate governmental decisionmaker. In *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), this Court held that the role private coal producers played in recommending minimum prices to a federal coal commission, which ultimately established those minimum prices, did not constitute an unlawful delegation to private individuals. The private parties merely "operate[d] as an aid to the Commission but [were] subject to its pervasive surveillance and authority." 310 U.S. at 388. They thus "function[ed] subordinately to the Commission." *Id.* at 399. The governmental body, "not the [private producers], determine[d] the prices." *Id.*; *see also id.* at 388 (noting that the proposed prices could be "approved, disapproved, or modified by the Commission"). The federal commission had "authority and surveillance over the activities of these [private] authorities. *Since lawmaking is not entrusted to the industry*, this stat-

utory scheme is *unquestionably valid*." *Id.* at 399 (emphasis added).

Following the Supreme Court's ruling in *Adkins*, the lower courts have generally affirmed statutory schemes in which a private body "functions subordinately" to a federal agency in federal rulemaking. Provided that Congress subjects the private role in the rulemaking scheme to federal agency oversight, lower courts generally uphold statutes in which private parties play an advisory or ministerial function in a federal rulemaking scheme.

In *Pittston*, for instance, the Fourth Circuit upheld a statute that established a fund providing benefits to retired coal miners. *See* 368 F.3d 385. The statute granted the federal government sole authority to define the nature of the fund and who must contribute; to specify the amounts that must be paid; and to identify beneficiaries. Private parties were merely authorized to collect premiums and pay the beneficiaries. *See id.* The court concluded that the statute gave the private parties "*ministerial* and *advisory tasks* in a manner and to an extent that does not violate" the Constitution's private nondelegation principle. *Id.* at 398 (emphasis added).[11]

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[11] *See also, e.g.*, *Todd & Co.* v. *SEC*, 557 F.2d 1008, 1014 (3d Cir. 1977) ("The independent review function entrusted to the S.E.C." over self-regulatory markets "is a significant factor in meeting serious constitutional challenges to this self-regulatory mechanism."); *Ass'n of Am. Physicians & Surgeons* v. *Weinberger*, 395 F. Supp. 125, 129-30 (N.D. Ill.) (three-judge panel) (approving the use of private parties to review whether

(Continued ...)

Second, this Court has also upheld statutory schemes in which Congress conditions the effectiveness of a federal regulation on a referendum of the affected industry. In those circumstances, private individuals or organizations are permitted to have a say in whether a government-authored regulation will be put into effect in a particular region or industry, but only after the content of the regulation is already defined by constitutional officers.

Most notably, in *Currin*, this Court upheld a legislative scheme that required the Secretary of Agriculture to submit certain tobacco industry regulations to a referendum of growers in the geographic areas to be governed by the regulations. The Court reasoned that because the *Secretary* determined the regulations' content and the growers decided whether to accept them, "Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market." 306 U.S. at 15. In these circumstances, "it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application." *Id.* at

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Medicaid and Medicare services are medically necessary where the Secretary of Health, Education and Welfare retained the power to review such determinations), *aff'd*, 423 U.S. 975 (1975); *see also Noblecraft Indus., Inc.* v. *Sec'y of Labor*, 614 F.2d 199, 203 (9th Cir. 1980) (upholding OSHA's reliance on a private body to distill a "national consensus standard" for use in the sawmill and plywood industries because "OSHA in practice did not surrender to ANSI all its standard-making function;" rather, it "selected among the ANSI standards with apparent discrimination").

16. The "required favorable vote" is merely "one of these conditions." *Id.* To say that the private parties are "'exercising legislative power'" in these circumstances "'is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution.'" *Id.* (quoting *J.W. Hampton*, 276 U.S. at 407).

Likewise, in *United States* v. *Rock Royal Co-op.*, 307 U.S. 533 (1939), this Court upheld a statutory scheme where an Executive-authored order setting minimum milk prices could not be issued absent approval by two-thirds of the milk producers in a given market. 307 U.S. at 577-78. But, as in *Currin*, Congress directed that the *Secretary* prepare the order, and provided that the order not go into effect unless approved by the private producers.

In both cases, Congress authorized the executive agency to issue a rule, but then subjected the rule's implementation to an affirmative vote of affected parties. The people thus know whom to blame for the content of the regulation. And an affected subset of the people votes "yea" or "nay" as to whether the government-proposed rule will even apply to them, adding an *additional* layer of democratic accountability to the process. But with or without that additional layer of protection, the ultimate decision on the terms and conditions of federal policy is made by Congress.

II. THE DELEGATION TO AMTRAK VIOLATES THE PRIVATE NONDELEGATION PRINCIPLE

Applying these principles, the court of appeals correctly concluded that the delegation here to

Amtrak cannot pass constitutional muster.[12] The delegation lacks the political accountability and due process controls essential to protecting against arbitrary abuses of governmental authority by private entities.

The court found several aspects of the regulatory scheme constitutionally unsound: that Amtrak could craft regulations directly impacting third parties; that Amtrak, a private party, acted as a check on the federal agency's regulatory authority; and, most disturbing to the court, that Amtrak enjoyed "authority equal to the [agency]"—"[s]hould the [agency] prefer an alternative to Amtrak's proposed metrics and standards, § 207 leaves it impotent to choose its version without Amtrak's permission." Pet. App. 10a. It is not surprising that the court of appeals found no authority "embracing the position that a private entity may *jointly* exercise regulatory power on equal footing with an administrative agency." *Id.* at 14a (emphasis added).

The Government contends that the private nondelegation principle is satisfied here because "governmental entities had sufficient control over the development and adoption of the metrics and standards in the first instance." Pet'rs' Br. 19. But Amtrak's

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[12] *Amici* assume the correctness of the court of appeals' determination that Amtrak is a private, non-governmental entity for purposes of the application of the private nondelegation principle. *Amici* also adopt and incorporate Respondent's explanation of the mechanics of the statutory scheme and the effect of the metrics and standards on regulated freight railroads.

role goes well beyond the "subordinate," advisory function upheld in the *Adkins* line of cases. *Adkins*, 310 U.S. at 399. This statutory scheme is instead exceptional in granting Amtrak the authority to "jointly . . . develop" performance standards and metrics with a federal agency. Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, § 207(a), 122 Stat. 4916. Unlike the commission's role in *Adkins*, the Transportation Department cannot, by itself, draft a single metric or standard in the first instance and cannot modify any Amtrak-crafted metric or standard without the approval of Amtrak or some private arbitrator. Far from subordinate, Amtrak is at least co-equal with the executive agency.

The Government argues that Amtrak's "joint" statutory role is akin to the industry referenda upheld in cases like *Currin*. Pet'rs' Br. 22-23. As the court of appeals correctly reasoned, especially as it relates to due process protections against biased decisionmaking, there is a significant difference between the approval of a supermajority of an affected industry and a single industry actor setting standards that affect regulated competitors. *See* Pet. App. 10a n.4. As Amtrak effectively competes with freight railroads for the limited availability of tracks, the potential for self-interest affecting the metrics and standards is real.

The Government's argument also overlooks an important difference between this statutory scheme and those upheld in the *Currin* line of cases. In *Currin* and *Rock Royal*, the government actor—whether Congress itself or an executive agency acting at the

direction of Congress—controls the *content* of the regulation at issue. The industry referendum merely satisfies a condition that Congress has already established. *Currin* described the objectionable feature of *Carter Coal* as private industry participation in determining not merely the applicability of a regulation to certain facts, but also the *content* of that regulation, reasoning that it was constitutionally problematic that "a group of producers *may make the law and force it* upon a minority." 306 U.S. at 15-16 (emphasis added).

So, too, here. The statutory scheme at issue combines two features that, by themselves, may not be objectionable, but when combined, doom the constitutionality of the scheme. *See* Pet. App. 12a-13a (citing *Free Enterprise Fund*, 130 S. Ct. at 3146-47). Amtrak not only has a seat at the table in crafting the metrics and standards, but can also prevent any regulatory provision that it finds objectionable from taking effect simply by disagreeing with the government agency. This elevates Amtrak to a joint regulator with the Executive Branch. While the Department of Transportation may be able to prevent Amtrak from taking action on its own, the joint power-sharing arrangement sufficiently deprives the federal government of the ultimate control of the regulatory scheme so as to render the entire arrangement suspect.

The constitutional flaws of this power-sharing arrangement are exacerbated by the statute's arbitration provision, which, as Respondent correctly notes, permits wholly private arbitrators to determine applicable metrics and standards when Amtrak and the

Department are at odds. *See* Passenger Rail Investment and Improvement Act of 2008, § 207(d), Pub. L. No. 110-432, 122 Stat. 4917. When invoked, this provision permits Amtrak to circumvent government officials entirely in the development of metrics and standards. The Government seeks to overcome this flaw by simply denying that the statute permits private parties to serve as arbitrators. But just as the Executive Branch cannot "cure an unconstitutionally standardless delegation of power by declining to exercise some of that power," *Whitman*, 531 U.S. at 473, the Government here cannot save an otherwise improper delegation of authority to a private arbitrator by rewriting the statute to avoid that delegation. *See, e.g., Salinas* v. *United States*, 522 U.S. 52, 59-60 (1997) (constitutional avoidance canon is "not a license for the judiciary to rewrite language enacted by the legislature") (internal quotation marks and citation omitted).

At bottom, Amtrak's role in the development of metrics and standards governing competing railroads deprives the public of the accountability that is a central feature of the separation of powers. The statute endows Amtrak with a dual role—wielding both power of the pen and an effective veto over a government agency's regulatory approach. But the majority of Amtrak's governing board do not answer to the electorate the same way that a governmental actor would. Because they are not "executive" officers of the United States, for instance, they are not restrained by the oath of office that "conscientiously [binds]" all federal officials "to abstain from all acts inconsistent" with the Constitution. Joseph Story, *Commentaries on the Constitution of the United*

States, § 374 (1st ed. 1833); *cf. Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2667 (2013) (intervenors defending state statute "owe nothing of the sort [i.e., special duties] to the people" in the absence of oath of office). At the same time, the statute permits the Department of Transportation to plead "not our fault" when presented with a complaint by an affected freight railroad or a member of the public about the resulting metrics and standards.

The Constitution requires, in all circumstances, that the political branches of the federal government remain accountable to the people for laws enacted. Because it fails to promote that accountability and because it vests in a private industry actor significant regulatory authority to regulate its competitors, the statute here must fail constitutional scrutiny under the private nondelegation principle.

III. THE PRIVATE NONDELEGATION PRINCIPLE FINDS ONGOING APPLICATION IN CIRCUMSTANCES BEYOND THIS CASE

This case illustrates the need for continued judicial vigilance against the delegation of legislative authority to private parties. Such unconstitutional delegations of Congress's lawmaking power to private parties have, fortunately, been rare. But from time to time, Congress runs afoul of constitutional accountability principles in delegating unsupervised rulemaking authority to private parties. A vibrant private nondelegation principle serves as a check on such excesses by ensuring that laws are made by unbiased officials who are politically accountable to the people.

Amici's interest in the private nondelegation principle stems from what they believe to be another constitutionally problematic delegation of lawmaking authority to private entities. Specifically, *amici* submit that the Higher Education Act ("HEA"), improperly delegates unchecked legislative authority to private education accreditation agencies. *See* 20 U.S.C. § 1099b (2012). While the current dispute does not require the Court to pass on this separate statutory scheme, *amici* raise the issue to illustrate the need to continue to guard against private legislative delegations.

Historically, private accreditation agencies were purely voluntary organizations dedicated to assuring quality in the delivery of higher education services by their members through peer review. That purely voluntary role changed with the enactment of legislation culminating in the Higher Education Act of 1965, which enlisted these private organizations to play a central role in both determining and applying the standards by which higher educational institutions are eligible for federal funding.[13]

Under the HEA, private accreditation agencies now serve as gatekeepers to an educational institution's eligibility for federal financial aid. No institu-

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[13] *See generally* Hank Brown, *Protecting Students and Taxpayers: The Federal Government's Failed Regulatory Approach and Steps for Reform*, American Enterprise Institute, 2 (Sept. 2013), http://www.aei.org/files/2013/09/27/-protecting-students-and-taxpayers_164758132385.pdf.

tion can participate in federal student assistance, loan, or work-study programs without current accreditation by an accrediting agency. *See* 20 U.S.C. § 1099b(j). Given the significant role that federal funding plays in higher education, loss of accreditation is tantamount to a death sentence for an educational institution.

Accrediting agencies are given broad leeway under the HEA to establish and apply accreditation standards with minimal oversight by the Secretary of Education. By statute, the Secretary of Education's role is limited to accrediting the accreditors—that is, certifying an accreditation agency "to be a reliable authority as to the quality of education or training offered for the purposes" of the HEA's financial aid provisions. 20 U.S.C. § 1099b(a).

An accreditation agency must establish and maintain minimum accreditation standards that assess the institution based on ten statutory criteria, such as success with respect to student achievement, curricula and facilities, among others. 20 U.S.C. § 1099b(a)(5). With respect to the content of those standards, the Secretary's authority is severely circumscribed. The statute explicitly prohibits the Secretary from "establish[ing] any criteria that specifies, defines, or prescribes the standards that accrediting agencies or associations shall use to assess any institution's success with respect to student achievement." *Id.* § 1099b(g). Nor shall the Secretary "promulgate any regulation with respect to the standards of an accreditation agency or association described in subsection (a)(5)." *Id.* § 1099b(o). The Secretary has the authority to determine only

whether the minimum standards promulgated and applied by the accrediting agency itself are of sufficient quality to achieve the stated objectives of the coursework offered by the school. *Id.* § 1099b(a)(4), (5).

Critically, as long as it addresses the minimum criteria established by Congress, an accreditation agency can maintain and apply *any other standard* that it chooses, free from any oversight or review by the Secretary. *See* 20 U.S.C. § 1099b(g) ("Nothing in this chapter shall be construed to prohibit or limit any accrediting agency or association from adopting additional standards not provided for in this section."). Those extra-statutory accreditation standards are then used by the accreditation agency to approve or to deny an educational institution's accreditation. *See id.* The Secretary may not revoke an accreditation agency's certification based on the adoption of any such extra-statutory accreditation standard. *See id.* § 1099b(n)(3).

In addition, the statute does not authorize the Secretary to review an accreditation agency's *application* of its standards to an individual educational institution. *See* 20 U.S.C. §1099b(a)(6)(C); *see also* 34 C.F.R. § 600.41(e)(2) (2013). An accreditor's adverse determination *requires* the Secretary to terminate an institution's eligibility for federal funding, 20 U.S.C. § 1099b(j), and the Secretary is powerless to review or change the accreditation decision.

The HEA thus contravenes the private nondelegation principle in several respects. First, it bestows *substantial regulatory authority* on the private accreditation agencies, which have control over the ex-

penditure of billions of taxpayer dollars. It does not limit the subject matters on which the accreditation agency can establish accreditation standards, instead setting only statutory minimum criteria and leaving the accreditation agency unfettered discretion to develop more far-reaching standards to apply to educational institutions.

Second, in adopting and applying those standards for determining eligibility for federal funding, the private accreditation agencies are in no way subordinate to the Secretary. Rather than having the Secretary develop substantive standards, and granting ministerial authority to the private entity to implement those standards, *see* discussion, *supra* Section I.C, the statute does just the opposite. It vests vast unreviewable regulatory authority with a private entity and leaves to the Secretary the ministerial task of cutting off funding where the accreditation agency has determined to deny or withdraw accreditation.

Finally, it vests significant regulatory authority in the very stakeholders in the educational system. Private accreditation agencies are usually made up of administrators and faculty from the various member institutions. While the statute seeks to eliminate this bias by prohibiting any particular conflicts of interests, 20 U.S.C. § 1099b(a)(6), the very nature of the system ensures those conflicts, since faculty and administrators who help develop and apply the accreditation standards also work at institutions that benefit from their application. *See* Brown, *supra* note 13, at 2-3.

The HEA effectively grants no-strings-attached regulatory powers to a private entity made up of in-

terested stakeholders without retaining any significant federal control over that entity. The result has been an increasingly dysfunctional accreditation system. Accreditation agencies wield enormous authority over the distribution of billions of dollars in federal funding, yet are largely insulated from accountability to the public.[14] Rather than focus on educational outcomes—the purported objective of accreditation—modern accreditors often look to micromanage the affairs of the institutions they oversee.[15] And the HEA's limitations on federal oversight allow the

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[14] *See* Jay Schalin, *Time to Decouple Accreditation from Federal Funding*, the John William Pope Center (Nov. 21, 2013), http://www.popecenter.org/commentaries/article.html?id=2934#.U71ExVXD_5o.

[15] *See* Brown, *supra* note 13, at 5-6; *see also Keeping College Within Reach: Discussing Program Quality through Accreditation: Hearing Before the Subcomm. on Higher Educ. and the Workforce, Comm. on Educ. and the Workforce*, 113th Cong. (June 13, 2013) (Testimony of Anne D. Neal), *available at* http://www.goacta.org/images/download/NealTestimony6-13-13.pdf; *see also* Hank Brown, *The Rise of the Accreditor as Big Man on Campus*, Wall St. J. Jan. 14, 2013, *available at* http://goo.gl/j2SXPy (accreditors "focus[] on process and resources rather than on educational excellence"); Shirley M. Tilghman, *The Uses and Misuses of Accreditation, Address to the Reinvention Center Conference*, Princeton University (Nov. 9, 2012), *available at* http://www.princeton.edu/president/tilghman/speeches/20121109/ (accreditation "agencies have adopted a stance that too often places them in an adversarial posture vis-à-vis their member colleges and universities, inserting their own judgments into decisions of how best to achieve the enormously diverse academic missions of their membership").

Secretary of Education, when confronted with complaints about accreditation standards and their application, to fall back on the Department's powerlessness over accreditors under federal law.

Amicus curiae ACTA's recent experience with this system demonstrates the real-world implications of private accreditors' lack of accountability. In 2012, the Southern Association of Colleges and Schools Commission on Colleges placed the University of Virginia on "warning" status—a first step toward loss of accreditation—after a failed effort by the University's governing board to remove the school's president. The accreditor did so not because of any concern for educational outcomes stemming from the University's personnel decision, but because it disapproved of the process by which the decision was made. The accreditor found that the University was out of compliance with the accreditor's standards relating to the independence of the University's Board of Visitors. It did so notwithstanding that the composition of the board is entirely a function of state law—with each member appointed by the Governor and confirmed by the state legislature. *See* Va. Code Ann. § 23-70 (Supp. 2014). The accreditor further found that the University lacked what the accreditor considered to be sufficiently clear standards regarding the role of the faculty in governance.[16]

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[16] Jan. 15, 2013 Letter from Belle S. Wheelan to Teresa A. Sullivan, 1-3, *available at* http://www.virginia.edu/sacs/2013/sanctionletter.pdf; *see also* Brown, *supra* note 13, at 5-6.

In response to the accreditor's formal warning, *amicus curiae* ACTA filed a complaint with the Department of Education.[17] ACTA argued that the accreditor acted without authority in reprimanding the University of Virginia for what amounted to a disagreement with the manner in which the University board chose to administer the school's business. It complained in particular about the accreditation agency's application of its "institutional governance" standards, which had little to do with assessing the University's academic performance.

The Department responded by letter from an Assistant Secretary of Education, who noted that the "Department is expressly barred from dictating agency accrediting standards."[18] The Assistant Secretary concluded that the accreditor's institutional governance standards were beyond the Department's reach and that "the *Department does not have authority* to find an agency out of compliance with re-

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[17] Dec. 31, 2012 Letter from Anne D. Neal, American Council of Trustees and Alumni, to U.S. Department of Education Secretary Arne Duncan and Kay Gilcher, Director of the Accreditation Division at the U.S. Department of Education, *available at* http://www.goacta.org/images/download/12-31-12_Letter_to_DOE.pdf.

[18] Feb. 11, 2013 Letter from David A. Bergeron, Acting Assistant Secretary for Postsecondary Education, U.S. Department of Education, to Anne D. Neal, American Council of Trustees and Alumni, 1, *available at* http://s3.documentcloud.org/documents/612957/doe-response-to-acta-complaint.pdf.

spect to accreditation standards not required by [the HEA]."[19]

The Department's response is a textbook example of how private legislative delegations undermine constitutional accountability. The substantive decisions affecting rights under federal law are farmed out to private actors, leaving affected citizens no recourse to the political process. At the same time, the governmental actors to whom those citizens turn for redress of their grievances are able to wash their hands entirely of the matter. To borrow from *Free Enterprise Fund*, the buck stops nowhere. 130 S. Ct. at 3164.[20]

This case presents an important opportunity for this Court to reinforce the constitutional accountability that animates the separation of powers. Like the educational institutions and their students affected under federal law by private accreditation decisions,

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[19] *Id.* at 3 (emphasis added).

[20] *Amici* do not endorse vesting greater authority in the federal education officials as the proper solution to the HEA's private delegation problem. Other possible legislative approaches—such as breaking the link between accreditation and federal funding, requiring audited disclosure of key financial and productivity metrics, and demanding greater transparency of universities and schools that receive federal funding—would address the constitutional concerns, while offering greater flexibility in the educational marketplace. *See* American Council of Trustees and Alumni, *Why Accreditation Doesn't Work and What Policymakers Can Do About It* (June 2007), *available at* http://www.goacta.org/images/download/why_accreditation_doesnt_work.pdf.

Respondent is impacted by a system that delegates substantial legislative authority to a private actor unfettered from the constitutional checks and balances that control Congress and the Executive Branch. *Amici curiae* respectfully submit that the private nondelegation principle is the key to preserving responsiveness to the electorate in this case and others.

CONCLUSION

Amici curiae respectfully urge the Court to reaffirm the continuing vitality of the private nondelegation principle and to affirm the judgment of the court of appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-1080

In the Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,

Petitioners,

v.

ASSOCIATION OF AMERICAN RAILROADS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF ASSOCIATION OF INDEPENDENT PASSENGER RAIL OPERATORS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF ASSOCIATION OF INDEPENDENT PASSENGER RAIL OPERATORS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The Association of Independent Passenger Rail Operators is a trade association that promotes the expansion of passenger-rail service in the United States both by cultivating broad understanding of the ways that our nation's passenger-rail infrastructure benefits the public and by encouraging the development of a dynamic and competitive marketplace for passenger-rail services. AIPRO strives to foster a renaissance in rail travel by encouraging the adoption of commonsense federal legislation that will establish comprehensive federal standards for competition and excellence in rail operations while simultaneously providing the States with freedom to innovate in order to meet the unique needs of their citizens.[1]

AIPRO was formed in response to, and to further the objectives of, the federal statute at issue in this case—the Passenger Rail Investment & Improvement Act of 2008, Pub. L. No. 110–432, Div. B, 122 Stat. 4848, 4907. The PRIIA affords States the freedom to choose the passenger-rail carriers that serve them. It also created the first-ever federal program to support initiatives by the States to revitalize high-

[1] *Amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to the brief's preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

speed and intercity passenger-rail corridors, expand competition in passenger-rail service, and give States a greater role in policymaking about the passenger-rail options available to their citizens.

The independent railroads that are AIPRO's members are world-class innovators in passenger rail. Together, they carry 80 million passengers on more than 250,000 train trips in the United States and more than 1 billion passengers worldwide each year. Although AIPRO itself was formed just a few years ago to help achieve the PRIIA's vision of greatly enhanced competition in passenger-rail service in the United States, AIPRO's members have long competed directly with Amtrak for commuter-rail operations; and the PRIIA's framework for expanded competition is creating new opportunities for AIPRO's members to compete directly with Amtrak for intercity passenger-rail routes and operations as well. Accordingly, AIPRO's members have a strong interest in ensuring that federal regulatory authority over intercity passenger rail is exercised in a manner that is both fair and consistent with the United States Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Amtrak was first created, it effectively became the nation's sole provider of intercity passenger-rail service. At that time, the special powers and preferences that Congress granted to Amtrak did not disadvantage any other passenger-rail providers, because there were none. Today Amtrak is no longer a monopoly; the passenger-rail industry is now a highly competitive one. Yet Section 207 of the PRIIA confers on Amtrak the ability to regulate the entire industry.

It has long been settled that Congress may not delegate such regulatory authority to a private entity. See *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 310-311 (1936). Because regulation is "necessarily a governmental function," not a "private activity," a statute that "attempts to confer such power [on a private party] undertakes an intolerable and unconstitutional interference with personal liberty and private property." *Id.* at 311. As the decision of the court of appeals explains, *Carter Coal* recognized that "delegations to private entities are particularly perilous" because those entities "'are not bound by any official duty,' but may instead act 'for selfish reasons or arbitrarily.'" Pet. App. 19a (quoting *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116, 122 (1928)).

The PRIIA violates this constitutional proscription against delegation of governmental authority by making Amtrak—a private, for-profit corporation—at least coequal with the Federal Railroad Administration in imposing "metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations" (PRIIA § 207(a), 49 U.S.C. § 24101 (note))—standards that the PRIIA incorporates into a host of regulations that other passenger and freight railroads must satisfy or else be subject to penalties for noncompliance. The statute thus empowers Amtrak to exercise governmental authority to advance its own interests, even at others' expense.

For example, Amtrak's trains operate almost entirely on tracks owned by freight railroads, and hence Amtrak "compete[s] with [the freight operators] for use of their scarce track." Pet. App. 19a. The metrics and standards that Amtrak sets with the

FRA under Section 207 "define the circumstances" under which the Surface Transportation Board will investigate whether a freight railroad has met its "statutory obligation to accord preference to Amtrak's trains" in using the freight railroads' tracks. Pet. App. 11a. AIPRO agrees with the court of appeals and the respondent that Section 207 thus "grants Amtrak a distinct competitive advantage" over other railroads by allowing it to set the terms for giving its own trains priority to use tracks that Amtrak does not own, rather than making Amtrak build its own tracks, pay extra to have its trains put first in line on others' tracks, or wait its turn and suffer the lost revenues that slower service and delays may cause. Pet. App. 19a.

But that is not all. Although "Amtrak may not compete with the freight railroads for customers" (Pet. App. 19a), it *does* compete head-to-head for customers and routes with private, independent passenger railroads, including AIPRO's members. And Section 207 gives Amtrak a distinct, direct, and unfair advantage in that competition by making it the regulator for the entire industry, of which it is but one member. Congress's conferral on Amtrak of the authority to regulate the affairs both of host railroads and of all other providers of intercity passenger-rail service is precisely what this Court has declared to be "legislative delegation in its most obnoxious form." *Carter Coal*, 298 U.S. at 311.

The resulting harms to Amtrak's competitors and to free and open competition are substantial. First of all, the PRIIA provides that the failure of any intercity passenger train to satisfy the Amtrak-crafted Section 207 performance standards may trigger an investigation by the STB "to determine whether and

to what extent" the underperformance is "due to causes that could reasonably be addressed by" the "intercity passenger rail operator[]." PRIIA § 213(a), 49 U.S.C. § 24308(f)(1). In other words, Amtrak's setting of industry performance standards directly affects whether and when its competitors may be subjected to regulatory-enforcement actions by the STB. Beyond that, when rail carriers seek through a competitive-bidding process to win a contract for an intercity passenger route currently held by Amtrak, their bids must be "evaluat[ed] * * * against the financial and performance metrics developed" by Amtrak under Section 207 (PRIIA § 214(a), 49 U.S.C. § 24711(a)(4)), and the winning bidder's contract must then incorporate those standards (*id.* § 24711(a)(5)(A)). Additionally, when States apply for federal grants to improve infrastructure for intercity passenger service, their applications must be "measured against" the Section 207 standards. PRIIA § 301, 49 U.S.C. § 24402(c)(2)(A)(i). Thus, although States are supposed to be free to contract with Amtrak or another provider for passenger-rail service, their efforts to upgrade the tracks and stations for that service are conditioned by the regulatory requirements that Amtrak has set. The terms of any grants that they receive will therefore be geared to Amtrak's needs and expectations, regardless of whether those are appropriate arrangements for other potential bidders, for the contracting States, or for the train-riding public.

As the D.C. Circuit explained, "[p]erverse incentives abound." Pet. App. 20a. The point of the nondelegation principle is that governmental regulation should "look to the public good, not private gain." Pet. App. 19a. But nothing in the PRIIA "restrains [Amtrak] from devising metrics and standards that

inure to its own financial benefit rather than the common good." Pet. App. 20a. Accordingly, the court of appeals correctly held that it is an unconstitutional delegation of legislative authority. The judgment should be affirmed.

ARGUMENT

SECTION 207 OF THE PRIIA IMPERMISSIBLY CONFERS ON AMTRAK REGULATORY AUTHORITY OVER ITS COMPETITORS IN THE PASSENGER-RAIL INDUSTRY.

A. The Provision Of Passenger-Rail Service Is A Competitive Industry In Which Amtrak Is But One Competitor.

The Rail Passenger Service Act of 1970, Pub. L. No. 91–518, 84 Stat. 1327, had the effect of creating for Amtrak a monopoly over intercity passenger-rail service in the United States. See Amtrak Reform Council, *Report to Congress: An Action Plan For The Restructuring And Rationalization Of The National Intercity Rail Passenger System* 1 (Feb. 7, 2002) (describing Amtrak as "a monopoly operator"), *available at* http://tinyurl.luzssgd. The purpose of that Act was to "reinvigorate a national passenger rail system that had * * * grown moribund and unprofitable" by authorizing private railroads to transfer to Amtrak their "common carrier obligation to offer intercity passenger service." Pet. App. 3a. In exchange for being relieved of this obligation, the freight railroads agreed to permit Amtrak to use their tracks and other facilities for Amtrak's intercity passenger service. Pet. App. 3a; see also *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 454-455 (1985). Congress later mandated that Amtrak's passenger trains would "be accorded preference over freight trains in the use of any given line

of track, junction, or crossing" in order to facilitate speedy passenger service using the freight railroads' tracks. Amtrak Improvement Act of 1973, Pub. L. No. 93–146, § 10, 87 Stat. 548, 550; see 49 U.S.C. § 24308(c) (current enactment). Today, as a result, "roughly 97% of the track over which Amtrak runs its passenger service" is owned by private freight railroads. Pet. App. 4a.

In recent years, however, Congress has laid the foundation for reintroducing competition into the market for intercity passenger-rail service. In this new environment, States may contract with rail carriers and other service providers to operate and maintain intercity passenger trains and the railway infrastructure over which they run. See, *e.g.*, Mich. Dep't of Transp., *State Long-Range Transportation Plan 2005-2030: Intercity Passenger Technical Report* iii, 1 (Nov. 8, 2006) ("MDOT uses state and/or federal funds to contract with the carriers to provide route service that would not otherwise exist," and "provides state and/or federal funds to enhance the intercity passenger infrastructure"), *available at* http://tinyurl.com/mwkoveb; Okla. Dep't of Transp., *Oklahoma Statewide Freight And Passenger Rail Plan* 11-17 (May 2012) ("the operation of the *Heartland Flyer* is governed by an operating agreement between Amtrak and the States of Oklahoma and Texas" that "outline[s] the services to be provided, the responsibility for the provision of certain facilities and equipment, and the payments to be made by the parties"), *available at* http://tinyurl.com/mq42fg5.

The first important move toward this new competitive regime was Congress's enactment of the Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105–134, 111 Stat. 2570, which terminated

Amtrak's monopoly over intercity service. See Amtrak Reform Council, Background Information, http://tinyurl.com/k33mdr2 (last updated Apr. 30, 2002) ("[t]his Act (P.L. 105-134) provided that Amtrak * * * would no longer * * * hold a rail passenger monopoly"); 49 U.S.C. § 24701 (Historical And Statutory Notes) (explaining that the 1997 amendments repealed the former requirement that "'a person may provide intercity rail passenger transportation over a route over which Amtrak provides scheduled intercity rail passenger transportation * * * only with the consent of Amtrak'"). Then, in 2008, Congress passed the PRIIA, which includes a number of provisions designed to foster competition in intercity passenger-rail service:

- Section 217 authorizes States to select "an entity other than Amtrak to provide services required for the operation of an intercity passenger train route * * *." PRIIA § 217, 49 U.S.C. § 24702 (note).

- Section 301(a) authorizes the Secretary of Transportation to "make grants * * * to assist in financing the capital costs of facilities, infrastructure, and equipment necessary to provide or improve intercity passenger rail transportation." PRIIA § 301(a), 49 U.S.C. § 24402(a)(1). A State that applies for a grant must either "select[] the proposed operator of its service competitively" or "provide written justification to the Secretary showing why the proposed operator is the best, taking into account price and other factors, and that use of the proposed operator will not unnecessarily increase the cost of the project." PRIIA § 301(b), 49 U.S.C. § 24402(b)(3).

- Section 214 directs the Federal Railroad Administration to establish an Alternate Passenger Rail Service Pilot Program, under which "a rail carrier or rail carriers that own infrastructure over which Amtrak operates a[n] [intercity] passenger rail service route" may "petition the Administration to be considered as a passenger rail service provider over that route *in lieu of Amtrak* * * *." PRIIA § 214(a), 49 U.S.C. § 24711(a)(1) (emphasis added).

The healthy competition that Congress cultivated has begun to take root. For example, an AIPRO member and three other railroads responded to a Request for Proposals from the Indiana Department of Transportation to operate the Hoosier State passenger-rail service between Indianapolis and Chicago, and the State has selected a new operator.[2] Washington and Oregon have issued a Request for Information regarding the Cascades Intercity Passenger Rail Service to determine a pathway to full competition and identify service providers.[3] Texas has issued a similar Request concerning the Heartland Flyer Service between Fort Worth and Oklaho-

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[2] See *INDOT Receives Four Proposals For Hoosier State Passenger-Rail Service*, Progressive Railroading, May 6, 2014, http://tinyurl.com/ol22rdy; *Hoosier State Passenger-Rail Service Extended Through January*, Progressive Railroading, Aug. 21, 2014, http://tinyurl.com/n3aec7l.

[3] See Wash. Dep't of Transp., RFI-2014-0409, Cascades Intercity Passenger Rail Service Opportunities (Apr. 9, 2014), *available at* http://tinyurl.com/mcahm34; Wash. Dep't of Transp., RFI-2014-0409, Status Update: May 2014 (May 2014), *available at* http://tinyurl.com/klhyv3t.

ma City.[4] And Connecticut has announced that it will launch a competition for additional passenger service between New Haven, Hartford, and Springfield.[5] AIPRO members have submitted or expect to submit information and bids on many of these. See, *e.g.*, Wash. Dep't of Transp., RFI-2014-0409, Status Update: May 2014 (May 2014) (AIPRO and AIPRO members First Transit, Inc., Herzog Transit Services, Inc., Keolis America, Inc., and Veolia Transportation responded to Request for Information), *available at* http://tinyurl.com/klhyv37.

Yet as we next explain, Section 207 undermines this expanding competition in the provision of intercity passenger-rail service by vesting one firm—Amtrak—with regulatory authority over matters affecting the entire industry. It thereby contravenes the nondelegation doctrine's fundamental principle that federal regulation must "look to the public good, not private gain." Pet. App. 19a.

B. Section 207 Unconstitutionally Delegates To Amtrak Regulatory Authority Over Amtrak's Direct Competitors In The Passenger-Rail Industry.

As the D.C. Circuit explained below, this Court's decision in *Carter Coal* "specifically condemned delegations made not 'to an official or an official body,

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[4] See Tex. Dep't of Transp., Rail Div., Request for Information for Intercity Passenger Transit Service Opportunities—Rail or Bus (due Aug. 18, 2014), *available at* http://tinyurl.com/jw3swmz.

[5] See Press Release, Gov. Dannel P. Malloy, State of Connecticut, Gov. Malloy: State to Seek Providers for New Haven–Hartford–Springfield Passenger Rail Service (Apr. 2, 2014), *available at* http://tinyurl.com/mcl4qlg.

presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.'" Pet. App. 19a (quoting *Carter Coal*, 298 U.S. at 311). The Court stated unequivocally that "in the very nature of things, one person may not be intrusted with the power to regulate the business of another, and especially of a competitor." *Carter Coal*, 298 U.S. at 311. But that is precisely what Section 207 does.

As an initial matter, there can be no serious doubt that Amtrak is a private entity. Congress, this Court, and Amtrak itself have all expressly acknowledged that Amtrak "is not a department, agency, or instrumentality of the United States Government." 49 U.S.C. § 24301(a)(3); see also *Nat'l R.R. Passenger Corp.*, 470 U.S. at 454 (Amtrak "is not 'an agency or establishment' of the Government") (quoting H.R. Rep. No. 91–1580, at 5); Nat'l R.R. Passenger Corp., *Freedom Of Information Act Handbook* 1 (2008) ("The National Railroad Passenger Corporation, also known as Amtrak, is not a government agency or establishment [but] a private corporation operated for profit."). Accordingly, the court of appeals correctly concluded that, "by designing Amtrak to operate as a private corporation—to seek profit on behalf of private interests—Congress has elected to deny itself the power to delegate it regulatory authority under § 207." Pet. App. 23a.

Yet Section 207 does exactly that. It provides that "the Federal Railroad Administration and Amtrak shall jointly * * * develop" performance metrics and standards applicable to intercity passenger-rail operations. PRIIA § 207(a), 49 U.S.C. § 24101 (note). By requiring the FRA and Amtrak to develop these standards "jointly," Section 207 unconstitu-

tionally places Amtrak at least on par with the FRA as a regulator of intercity passenger-rail service—a status that no other service-provider shares. And the PRIIA goes even further: It requires the FRA either to accept the metrics and standards favored by Amtrak or to submit the determination of the standards "to an arbitrator the agency would have had no hand in picking." Pet. App. 15a. As such, Section 207 effectively assigns to Amtrak or a private arbitrator the FRA's regulatory power: Either the agency must accept Amtrak's preferred standards or an arbitrator may impose those standards even over the agency's strenuous objection. Pet. App. 10a ("Should the FRA prefer an alternative to Amtrak's proposed metrics and standards, § 207 leaves it impotent to choose its version without Amtrak's permission.").

As explained below, the PRIIA then incorporates Amtrak's metrics and standards into a host of regulatory requirements that are binding on and enforceable against other railroads. The PRIIA thereby makes other railroads subject to regulatory action and regulatory penalties for noncompliance with Amtrak's standards (or for contributing, even if only indirectly, to Amtrak's own noncompliance with those standards). And it distorts both federal grant-making and the awarding of state contracts to bidder railroads by conditioning awards of federal funds on compliance with Amtrak's standards. In short, the practical effect of the PRIIA is that a private party directly exercises federal regulatory authority over the industry in which it participates—precisely what this Court condemned in *Carter Coal*.

1. Amtrak's Section 207 standards expressly apply to all intercity passenger trains, not just to Amtrak's trains.

By its plain language, Section 207 empowers Amtrak to regulate its competitors directly. In pertinent part, that Section provides:

> the [FRA] and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations * * *.

PRIIA § 207(a), 49 U.S.C. § 24101 (note). In other words, Section 207 directs Amtrak and the FRA to devise performance standards for "intercity rail passenger train operations" generally, not just for Amtrak's own operations. And because, as explained above, the PRIIA expressly contemplates that intercity passenger-rail service may be operated by entities other than Amtrak, albeit only under the terms set by Section 207, it follows that Amtrak, as coauthor of the Section 207 metrics and standards, is functioning as a regulator over its competitors—including over AIPRO's members.

This scenario is particularly inequitable in light of Amtrak's statutory preference over freight traffic on Amtrak's host railroads. See 49 U.S.C. § 24308(c). Amtrak's competitors must meet the same Section 207 performance requirements as Amtrak, but they

do not have the right that Amtrak does to put its trains ahead of other traffic on the tracks that everyone must use. Thus, Amtrak has a distinct competitive advantage in satisfying the performance standards that it crafted because the standards define the terms of the preference that other railroads must give to Amtrak.

Adding to the unfairness is the fact that, although Section 207 directs Amtrak and the FRA to consult with certain other stakeholders in developing the performance standards, the statute does not afford even this limited right to Amtrak's competitors in the provision of passenger-rail service before permitting Amtrak to impose regulations on them. See PRIIA § 207(a), 49 U.S.C. § 24101 (note) (listing stakeholders with consultation rights). Thus, when Amtrak and the FRA initially proposed the Section 207 metrics and standards in March 2009 (see J.A. 11), they solicited comments from the stakeholder groups specifically identified in the statute (see J.A. 75) but did not afford Amtrak's competitors in the passenger-rail industry any opportunity to comment—even though these competitor passenger railroads would be directly subject to the new regulatory standards.

In *Carter Coal*, this Court invalidated as an unconstitutional delegation of governmental authority a statute that conferred on a specified majority of coal producers and miners the power to set maximum labor hours and minimum wages that would be applicable to all industry participants. See 298 U.S. at 284, 310-11. Section 207 does precisely the same thing, but to an even greater degree: A single market participant regulates the entire industry, without

even the pretext of soliciting input from any of its direct competitors.

2. Amtrak's Section 207 standards may trigger STB investigations and enforcement actions against Amtrak's competitors.

Section 213 of the PRIIA provides for investigation and enforcement actions by the STB any time that "any intercity passenger train"—not solely those operated by Amtrak—fails to achieve 80 percent on-time performance or fails to meet the Section 207 service-quality standards for two consecutive quarters. PRIIA § 213(a), 49 U.S.C. § 24308(f)(1). In those circumstances, the STB "may" launch an investigation on its own initiative, and it "shall" do so upon receiving a complaint from "Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service." *Ibid.* The purpose of the STB investigation is "to determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak *or other intercity passenger rail operators*." *Ibid.* (emphasis added). Thus, all intercity passenger-rail operators are subject to investigation and potential enforcement actions for failing to meet the standards that Amtrak, but no other operator, crafted; and it appears that any operator may be blamed and held accountable for *Amtrak's* failings as well.

Furthermore, Amtrak may itself choose to be the complaining party for its own failure to meet the performance standards in order to compel the STB to investigate either the freight railroads or other pas-

senger railroads that use the tracks. If Amtrak persuades the STB that its poor performance resulted from a host railroad's failure to afford sufficient preference to Amtrak's trains over other rail traffic, the STB is authorized to impose damages against the host railroad and to grant "such other relief to Amtrak as it determines to be reasonable and appropriate." PRIIA § 213(a), 49 U.S.C. § 24308(f)(2).[6]

The STB may also order a freight railroad "to remit the damages awarded under this subsection to Amtrak or to an entity for which Amtrak operates intercity passenger rail service," with the damages to "be used for capital or operating expenditures" on the affected route. PRIIA § 213(a), 49 U.S.C. § 24308(f)(4). There is no comparable damages remedy if a passenger railroad other than Amtrak fails to meet the mandatory on-time-performance standards that Amtrak has set, even if the STB determines that the failure is attributable either to a host railroad or to Amtrak's exercise of its statutory preference, which may have the effect of shunting other

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[6] Notably, too, when the STB investigates poor performance by Amtrak, the governing Section 207 standards (which Amtrak crafted) specify that the principal evidence of the cause of delays is to be Conductor Delay Reports, which Amtrak's own conductors prepare. See J.A. 44; J.A. 138 n.23. These reports are based solely on the conductors' personal observations and do not include facts about which a conductor was unaware at the time—such as, for example, a government inspection of another railroad that slowed rail service for everyone. The reports thus often inaccurately assign blame for any delays. See J.A. 181. In short, Amtrak not only writes the governing performance standards and initiates regulatory investigations and enforcement actions applying those standards, but also prepares the evidence used to assign blame for failing to meet the standards that it has imposed.

operators' passenger trains aside in favor of Amtrak's. Thus, Amtrak not only sets the rules under which others must pay damages when Amtrak's own trains are late, but it then gets to use those damages to cover its ordinary expenses or to upgrade its service, giving itself even greater competitive advantages over the other passenger railroads with which it competes.

3. Amtrak's Section 207 standards govern the selection of operators to assume Amtrak's existing intercity routes.

Section 214 of the PRIIA establishes an "Alternative Passenger Rail Service Pilot Program," under which "a rail carrier * * * that own[s] infrastructure over which Amtrak operates a passenger rail service route" may bid for a franchise to operate intercity passenger service over that route "in lieu of Amtrak." PRIIA § 214(a), 49 U.S.C. § 24711(a)(1). But the PRIIA subjects non-Amtrak service providers to the Section 207 standards at both ends of this bidding process.

On the front end, Section 214 "requires the [FRA] to select winning bidders by evaluating the bids against the financial and performance metrics developed under section 207." PRIIA § 214(a), 49 U.S.C. § 24711(a)(4). On the back end, Section 214 requires that any operating contracts must incorporate the Section 207 standards. PRIIA § 214(a), 49 U.S.C. § 24711(a)(5)(A) (contracts must include "the right and obligation to provide passenger rail service over that route subject to such performance standards as the Administration may require, consistent with the standards developed under section 207 of the [PRIIA]"); see also PRIIA § 214(c), 49 U.S.C. § 24711(c)(1)(B) (providing that a selected passenger

railroad's contractual right to operate a franchised route is conditioned on its "compliance with the minimum standards established under section 207 of the [PRIIA] and such additional performance standards as the Administration may establish").

The upshot is that Amtrak sets the criteria against which bids are evaluated in a competitive-bidding process in which Amtrak itself is a participant, and it sets the requirements that a successful bidder would have to meet under the contract that is ultimately awarded. Even if Amtrak does not intentionally seek to give itself an unfair advantage in the bidding process, therefore, the deck will inevitably be stacked in its favor because it developed the governing criteria and performance standards with an eye to its own business interests, capabilities, and needs, without affording similar consideration to how they may affect competition or competitors for the route or service.

4. Grant applications under the PRIIA are subject to Amtrak's Section 207 standards.

The PRIIA also establishes a federal grant program to improve infrastructure that supports intercity passenger-rail service. See PRIIA § 301, 49 U.S.C. §§ 24401–24406. Although only States, state agencies, groups of States, or interstate compacts are eligible to apply for or receive these grants (see PRIIA § 301(a), 49 U.S.C. §§ 24401(1), 24402(a)(1)), passenger railroads may bid to design, build, and maintain the capital projects funded by the grants. Once again, however, the criteria for selecting projects to receive the grants incorporate Amtrak's Section 207 metrics and standards.

Specifically, the Secretary of Transportation is required to select projects for grant awards based on criteria that include "the project's levels of estimated ridership, increased on-time performance, reduced trip time, additional service frequency to meet anticipated or existing demand, or other significant service enhancements as measured against minimum standards developed under section 207 * * *." PRIIA § 301(a), 49 U.S.C. § 24402(c)(2)(A)(i). Accordingly, the Section 207 standards developed and imposed by Amtrak and the FRA govern any grant requests in which intercity passenger-rail operators might have an interest by virtue of contracts with state grant applicants or recipients. Thus, Amtrak effectively controls the terms on which federal grants are made; and having imposed the governing regulatory standards based on its assessment of its own business needs, it almost inevitably becomes the preferred contractual partner with States on the federally funded infrastructure projects that they wish to pursue.

* * *

In *Carter Coal*, this Court held that a statutory scheme that "conferred upon the majority * * * the power to regulate the affairs of an unwilling minority" was "legislative delegation in its most obnoxious form." 298 U.S. at 311. The delegation of regulatory authority in Section 207 of the PRIIA is equally—if not more—"obnoxious," because it empowers a single private entity to regulate the affairs of its entire industry and every participant in the market. Accordingly, Section 207's "attempt[] to confer such power" is "an intolerable and unconstitutional interference with personal liberty and private property." *Ibid.*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 13-1080

In the
Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,
Petitioners,

v.

ASSOCIATION OF AMERICAN RAILROADS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual Cato Supreme Court Review.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing 350,000 member businesses in Washington, D.C., and all fifty states. Founded in 1943, as a nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB's Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the legal voice for small businesses.

This case is of significant concern to *amici* because it implicates an important structural limitation on the exercise of lawmaking power. *Amici* believe the court below correctly held that,

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[1] All parties have consented to the filing of this brief, and correspondence confirming such consent accompany this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

under this Court's precedents, private entities must be "limited to an advisory or subordinate role in the regulatory process." Pet. App. 14a. *Amici* believe that weakening the rule against private-party delegations would particularly threaten economic liberty by empowering state-favored market incumbents, with interests "adverse to the interests of others in the same business," to regulate their own industry. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States," ART., I § 1, and "permits no delegation of those powers." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). The theory underlying this restriction is that legislative powers, "being derived from the people by a positive voluntary grant," may be exercised only "by such men, and in such forms" as the people have authorized. JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT, ch. 11 § 141 (1690).

The nondelegation doctrine rests not on idle formalism, but on a recognition that the exercise of lawmaking power outside the Constitution's procedures and institutional design endangers the democratic interests that those forms secure. Elected legislators' dependence on the people promotes democratic accountability; unelected administrators answer to no voter. Equal representation of states in one house is meant to safeguard federalism; bureaucracies housed in Washington, D.C., have no such intrinsic allegiance. Bicameralism, staggered terms of office, and varied constituencies imbue lawmaking with distinctive deliberative qualities; the federal regulatory process thrives instead on centralization.

Private-party delegation is "legislative delegation in its most obnoxious form," *Carter Coal*, 298 U.S. at 311, because it operates entirely outside our constitutional architecture and the republican values it protects. Private entities take no oath, hold no office of public trust, answer to no voter, and are not

subject to the same checks and balances that control and limit the exercise of power by constitutional actors. Placing regulatory power directly in private hands raises a particularly acute risk that "special interests could be favored at the expense of public needs," *INS v. Chadha*, 462 U.S. 919, 950 (1983); *see also Carter Coal*, 298 U.S. at 311.

It is widely recognized that this Court has taken a permissive approach to reviewing the scope of legislative delegations to administrative agencies. But far from justifying a lax approach to delegations of regulatory power to private actors, the reasons for and consequences of the Court's underenforcement of the conventional nondelegation doctrine underscores the need for robust enforcement of the rule against private-party delegations.

Three prudential considerations explain this Court's toleration of broad delegations to federal regulatory agencies. First, the conventional nondelegation doctrine presents judicial administrability problems. Because "'a certain degree of discretion, and thus of lawmaking, inheres in most executive . . . action,'" it is difficult to say when a statute crosses the line between authorizing valid use of executive discretion and impermissibly delegating legislative power. *Whitman*, 531 U.S. at 475 (citation omitted). Second, the Court and commentators have suggested that the President's political accountability can serve as a second-order substitute for diminished congressional accountability. Third, the Court has suggested that "Congress simply cannot do its job absent an ability

to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

Whatever the strength of these considerations as a basis for indulging broad delegations to executive agencies, all three factors favor unflinching application of the rule against delegating regulatory authority to private parties. Evaluating the validity of private delegations does not present a judicial line-drawing challenge; when Congress delegates regulatory power to private parties, there is no need to make fine distinctions between executive and legislative power because private parties possess neither. Considerations of political accountability also favor strict policing of private delegations because private entities, by definition, do not answer to popular will. And as for the demands of necessity, if Congress is unable to fulfill its regulatory ambitions, it can direct a sizeable federal bureaucracy to do the job. There is no credible argument that workable government requires appointing private entities as co-regulators on an "equal footing" with federal agencies, as Congress did in the Passenger Rail Investment and Improvement Act of 2008 (PRIIA). Pet. App. 14a.

Judicial underenforcement of the nondelegation doctrine puts all the pressure on the structural protections against excessive delegation built into the Constitution's design. Accordingly, while deferring on substantive questions of degree, this Court has vigorously enforced the Constitution's procedural rules governing how and by whom law is made. The Court has invalidated attempts by Congress to legislate even to a minor degree outside bicameralism

and presentment procedures, *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991); *Chadha*, 462 U.S. 919; to delegate to agents of Congress a hand in execution of the law, *Bowsher v. Synar*, 478 U.S. 714 (1986); or to delegate to the President a power to effectively repeal or amend statutes by unilateral action, *Clinton v. City of N.Y.*, 524 U.S. 417 (1998). In these instances, the Court has struck down statutory delegations that place the wrong kind of power in the wrong institutional hands.

The Court should do the same here by reaffirming that a private party's role in regulation must "function subordinately" to the Executive Branch. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940). As the court below correctly held, section 207 of PRIIA violates that rule by permitting a private entity to "coauthor" regulations with a federal agency. Pet. App. 47a. The Court should affirm.

ARGUMENT

Petitioners are quick to remind us that this Court has not struck down a statute under the conventional nondelegation doctrine since 1935. Pet. Br. 20. Their hope, it seems, is that the rule against private-party delegations has suffered a "death by association," JOHN HART ELY, DEMOCRACY AND DISTRUST 133 (1980), despite the absence of any federal case "embracing the position that a private entity may jointly exercise regulatory power on equal footing with an administrative agency." Pet. App. 14a. Judicial forbearance with respect to the *scope* of permissible delegations, however, underscores the

need for scrupulous enforcement of *structural* limitations on delegation of lawmaking power—particularly the rule against private delegations.

I. The Prudential Reasons Invoked To Justify Underenforcing The Nondelegation Principle Counsel In Favor Of Robust Enforcement In This Case.

The Court has long and repeatedly recognized that "Congress generally cannot delegate its legislative power." *Mistretta*, 488 U.S. at 371–72. Despite its foundational importance in principle, however, the nondelegation doctrine has been honored "almost always in the breach." David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 201 (2002). The nondelegation doctrine continues to inform the interpretation of regulatory statutes, *see Mistretta*, 488 U.S. at 374 n.7; *cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000), but the doctrine's direct enforcement turns on a test that even the most breezy grants of regulatory authority have survived. *See, e.g.*, *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943) (upholding delegation to regulate broadcast licensing as "public interest, convenience, or necessity" require); *see also* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1240 (1994). In view of this gap between constitutional principle and judicial practice, the nondelegation doctrine may be the most "famously underenforced" doctrine in constitutional law. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2358 (2006).

But the nondelegation doctrine has been underenforced largely for *prudential* reasons: doubts about judicial administrability, adequate trust in political accountability of executive agencies, and accommodation of the perceived necessities of the modern administrative state. Whatever bearing those prudential considerations have on delegations to Executive Branch agencies, they decisively counsel in *favor* of robust enforcement of the long-settled rule against delegations to private entities.

A. Judicial Administrability

The most prominent explanation for underenforcement of the nondelegation doctrine is that courts are ill-equipped to address the problem. This Court has noted that it has "not been notably successful in describing" the "line that separates proper congressional conferral of Executive power from unconstitutional delegation of legislative authority." *Printz v. United States*, 521 U.S. 898, 927 (1997). "[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts." *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting). Because "a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action," *id.* at 417, it is exceedingly difficult to determine when a statutory delegation crosses the line between authorizing use of executive power (which administrative agencies may exercise) and legislative power (which resides exclusively in Congress).

Accordingly, this Court has "almost never felt qualified to second-guess Congress regarding the

permissible degree of policy judgment that can be left to those executing or applying the law." *Id.* at 416; *see also Whitman*, 531 U.S. at 474. Scholarly commentary echoes this concern: "Although some constitutional line surely separates permissible and impermissible delegations, the need to identify that line assigns the judiciary a terrible task." John F. Manning, *Textualism As A Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 727 (1997); *see also, e.g.*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 326–27 (2000) ("How much executive discretion is too much to count as 'executive'? No metric is easily available to answer that question.").

Considerations of judicial administrability decisively favor resolute enforcement of the rule against private delegations. That rule presents no line-drawing challenges for a simple reason: Private actors possess *neither* executive power nor legislative power under the Constitution. While lawmaking by administrative agencies can be viewed as ancillary to their (legitimate) executive functions, delegation of regulatory authority to a private entity rests on no similar foundation. Congress's delegation of *any* policymaking authority to a private party is therefore either a naked delegation of legislative power or an unconstitutional transfer of executive power from the President to a private person. But either way, the delegation cannot be reconciled with the Constitution. That is one reason this Court has held that a private party cannot play a regulatory role unless it "function[s] subordinately" to an Executive Branch agency. *Sunshine Anthracite*, 310 U.S. at 399. That test does not turn on close judgment calls or questions of degree.

The only judicially unmanageable task in this case is the one that the government asks this Court to undertake. Petitioners propose that courts should ask whether the federal government "retained sufficient control" over the private regulatory activity. Pet. Br. 15, 19. "[S]ufficient control" does not mean that the private party must be subordinate to a government agency; the government does not even attempt to defend PRIIA based on that formulation. Instead the new sufficient-control test turns on multiple "factors" bearing on the relationship between the private party and the government, including an administrative agency's "active participation" in devising the regulation; an agency's "independent assent" to the regulation *or* an arbitrator's approval of a compromise regulation hewn from the private party's and agency's divergent positions; required "consultation with [other] stakeholders"; and presumably any other factors that affect the degree of government control exercised over the private co-regulator. Pet. Br. 15–16. The government is sure it will know "sufficient control" when it sees it—and unsurprisingly it has announced that PRIIA satisfies that test. But the government's approach will only confound future judicial enforcement of the private-party nondelegation rule by replacing a relatively clear test (private parties cannot engage in regulatory activity unless they function subordinately to a federal agency) with a malleable inquiry into how much governmental control is enough to allay constitutional concerns.

B. Political Accountability

The nondelegation doctrine ensures that important policy choices are "made by Congress, the branch of our Government most responsive to popular will." *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring). But the Court and commentators have suggested that the political accountability of executive agencies can mitigate the erosion of "democratic values" threatened by excessive delegations. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2368–69 (2001) (arguing that administrative actions "taken pursuant to a delegation to an agency official, but clothed with the imprimatur and authority of the president, should receive maximum protection against a nondelegation challenge").

This consideration helps to explain judicial deference to interstitial lawmaking by federal agencies. As the Court observed in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency." *Id.* at 865–66. But there are limitations to the notion that presidential accountability for administrative lawmaking can substitute for legislative accountability for real lawmaking contemplated by the Constitution. Its most apparent weakness is that

the Framers did not devise a lawmaking process linked to just any sort of accountability, but rather a "single, finely wrought and exhaustively considered procedure" that promotes a singular kind of responsiveness and deliberation. *Chadha*, 462 U.S. at 951. Confidence in political accountability of executive agencies nevertheless helps account for judicial leniency toward traditional delegations.

By contrast, considerations of political accountability counsel in favor of scrupulous policing of the rule against private delegations. Unlike Congress, administrative agencies, and the courts, private entities have neither the "direct" nor "indirect" link to popular will that the Framers understood to be essential to republican government. *See* THE FEDERALIST NO. 39, at 237 (C. Rossiter ed., 1961) ("[W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior."). For that reason, a private party's exercise of co-equal regulatory power is antithetical to the republican form of government in a way that delegations to executive agencies are not. Indeed, unlike other statutory delegations, private delegations entrust power to a *person*—in this case, a corporate person—rather than to an *office* of public trust.

Nothing about Amtrak's peculiar legal status alters this analysis. The government makes much of the federal subsidies that Amtrak receives and the presidential appointment of most of its board

members. Pet. Br. 42–46. But accountability requires more than functional dependence on or "subservience to" the federal government, *id.* at 45–46, or else a good many private entities in heavily regulated industries qualify to serve as regulators. Fundamentally, political accountability requires knowing who to blame or credit—a fixed, "visible" connection that the public can trace from the immediate decisionmaker to the responsible elected official(s). Kagan, 114 HARV. L. REV. at 2337 (explaining "the connection between transparency and responsiveness"); *see also Loving v. United States*, 517 U.S. 748, 758 (1996) ("The clear assignment of power to a branch . . . allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance."). That fixed line of accountability is particularly necessary given government actors' ability to "shift[] [blame] from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author." THE FEDERALIST NO. 70, at 426.

In this case, Congress and the President have emphatically distanced themselves from Amtrak's actions and made clear that Amtrak is "a for-profit corporation," "not a department, agency, or instrumentality of the United States Government." 49 U.S.C. § 24301(a)(2) & (3). Whether that is greater part aspiration or reality is beside the point. The government should not be permitted to shield an unconstitutional delegation based on a connection that Congress and the President have, by statute, clearly forsworn.

C. Necessity

The Court's tolerance of broad delegations is also a concession to the perceived "inherent necessities" of the modern regulatory state. *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928). On this account, workable regulation requires confiding wide discretion in corps of administrators who possess the expertise and resources that Congress lacks. The Court's nondelegation "jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta*, 488 U.S. at 372; *see also Opp Cotton Mills, Inc. v. Adm'r of Wage & Hour Division of Dep't of Labor*, 312 U.S. 126, 145 (1941) ("Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy.").

This practical justification is not without critics. Scholars have argued that vast statutory delegations are best explained not by Congress's institutional incapacity, but by its strong institutional interest in evading responsibility. *See, e.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 3–21 (1993). With no meaningful limit on the scope of delegation, legislators are able to claim credit for enacting aspirationally-worded statutes while assigning the hard choices (and later, the blame) to bureaucrats. *See id.*

But if lack of information or decisional capacity is a reason to countenance open-ended delegations to

administrative agencies, it cannot excuse delegations of joint regulatory power to private parties. There is no credible argument that the smooth functioning of a federal regulatory apparatus that now employs more than a quarter-million people and spends $58 billion annually requires deputizing private entities to act as co-regulators. *See* Susan Dudley & Melinda Warren, *2015 Regulator's Budget*, Report of the George Washington University Regulatory Studies Center (July 2014) (analyzing federal spending and personnel "devoted to developing and enforcing federal regulations").[2] To be sure, regulation should be informed by the expertise and experience of the private sector. The Administrative Procedure Act creates a notice-and-comment process to meet that need, 5 U.S.C. § 553(c), and *amici* favor greater private-sector participation and transparency in the regulatory process. But a well-functioning regulatory state does not require handing over the drafting pen to a preferred private entity doing business in the regulated industry, as Congress did in PRIIA.

The facts of this case underscore this broader point. PRIIA confers joint rulemaking authority on Amtrak and a federal agency. Necessity is not the mother of this invention. Petitioners cannot and do not dispute that Congress could have achieved the ends of PRIIA just as effectively by authorizing the Department of Transportation to devise the metrics and standards, based on recommendations submitted by Amtrak and other interested parties. That is

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[2] *Available at* http:// http://regulatorystudies.columbian.gwu.edu/2015-regulators-budget-economic-forms-regulation-rise.

precisely how Congress has involved Amtrak in regulation in the past, *see* National and Community Service Act of 1990, Pub. L. No. 101-610, Title VI, § 601(d), 104 Stat. 3127, 3186 (directing the Secretary of Transportation to consult with Amtrak in issuing regulations), and PRIIA takes a similar approach to soliciting input from the freight railroads, *see* 49 U.S.C. § 24101 note (PRIIA § 207(a)) (requiring "consultation with [other] stakeholders" including freight railroads). Such a process for devising the metrics and standards may have been less skewed in Amtrak's favor, but it would have been no more taxing on Congress's decisional capacities.

II. The Court Has Vigilantly Enforced The Constitution's Structural Limitations On Delegation And Should Do So In This Case.

Permissive judicial review of the *scope* of statutory delegations heightens the need to uphold the Constitution's *structural* limitations on the exercise of legislative power. That understanding accords with this Court's separation of powers jurisprudence.

Private delegation is "legislative delegation in its most obnoxious form," *Carter Coal*, 298 U.S. at 311, because it operates outside the Constitution's procedural and institutional framework and the republican values it secures. Every constitutional actor is subject to checks and balances ensuring that no matter what mischief any branch attempts with the power it comes into, other branches have powerful tools to counter it. And the Constitution's

modes of selecting those who populate the branches of government—both election and presidential appointment with Senate confirmation—ensures that the voters, too, have some oversight role. These procedural and structural rules thus serve as a failsafe against the breach of substantive limitations that are more difficult to enforce. Abandoning these strictures endangers the constitutional interests that they are designed protect, including democratic accountability, individual liberty, and minority rights.

1. Even while affording Congress broad substantive latitude on delegations, the Court has scrutinized "whether the Legislature has followed a constitutionally acceptable procedure in delegating decisionmaking authority." *Metro. Wash. Airports Auth.*, 501 U.S. at 272. The Court has not hesitated to strike down delegations of power that deviate from the Framer's institutional design and procedures governing how and by whom law is made. *See id.* (invalidating a statute that gave members of Congress a policymaking role outside the confines of bicameralism and presentment); *see also Chadha*, 462 U.S. 919 (invalidating one-house legislative veto as evasion of bicameralism and presentment); *Bowsher*, 478 U.S. 714 (invalidating statute that lodged executive authority in an agent of Congress); *City of New York*, 524 U.S. 417 (invalidating the Line Item Veto Act).

In *Metropolitan Washington Airports Authority*, the Court considered the constitutionality of a statute that created a review board, composed of nine members of Congress, with the power to disapprove

certain decisions by the Washington, D.C.-area airport authority. There was no question Congress had the substantive power to govern the airports' operations, including by "enact[ing] general standards and assign[ing] to the Executive Branch the responsibility for making necessary managerial decisions in conformance with those standards." 501 U.S. at 272. But the "structure of our Government as conceived by the Framers of our Constitution disperses the federal power among the three branches . . . placing both substantive and procedural limitations on each." *Id.* The Court concluded that that the review board's structure breached those procedural limitations, regardless of whether its functions were essentially executive or legislative. "If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7." *Id.* at 276. Whether the statute was understood to place executive power in the wrong institutional hands, or to authorize legislative action through the wrong procedure, it was unconstitutional.

The Court anticipated the objection that the review board was only a minor "practical accommodation . . . that should be permitted in a 'workable government.'" *Id.* But even this seemingly harmless constitutional foot-fault was unacceptable because "the statutory scheme challenged . . . provides a blueprint for extensive expansion of the legislative power beyond its constitutionally confined role." *Id.* The Court thus understood that, given the lack of judicially enforced limits on the *scope* of

delegated powers, all of the doctrinal pressure rested on scrupulous enforcement of constitutional procedure and institutional design.

Similarly, in *Chadha*, the Court invalidated a provision of the Immigration and Nationality Act authorizing a one-house legislative veto of decisions by the Attorney General to allow individual deportable aliens to remain in the United States. 462 U.S. at 923. The Court began by explaining that "even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised." *Id.* at 945. One such demand is that Congress can make law only through the bicameralism-and-presentment procedure of Article I. That lawmaking process serves "essential constitutional functions," including tempering majoritarian passions inimical to liberty, promoting deliberation, and reducing the threat that "special interests could be favored at the expense of public needs." *Id.* at 948–51. The Court had no trouble concluding that the one-house veto was an unconstitutional circumvention of that procedure because it was "essentially legislative" in character. "When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it," and that presumption was confirmed by the fact that the one-house veto functioned as a substitute for lawmaking "in purpose and effect." *Id.* at 951–52.

Once again in *Bowsher*, the Court enforced a structural limitation on delegation by invalidating a statute under which Congress delegated its own

agent a role in executing the law. The Gramm-Rudman-Hollings Act capped the federal budget deficit for a five-year period and required the Comptroller General to determine and report to the President across-the-board spending cuts necessary meet the caps. The President was, in turn, required to issue a sequestration order implementing the cuts specified by the Comptroller General. The Court explained that because the Comptroller General was removable by Congress, not the President, he could not be clothed with power "entailing execution of the law," as the Act authorized. 478 U.S. at 732–33. "The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." *Id.* at 726. The Court thus concluded that violations of the Constitution's structural limitation on delegation of executive authority, no less than legislative authority, "must be resisted." *Id.* at 727 (quoting *Chadha*, 462 U.S. at 951).

Clinton v. City of New York also demonstrates the Court's assertive enforcement of procedural constraints on statutory delegation. In that case, the Court considered the constitutionality of the Line Item Veto Act, which permitted the President to "cancel in whole" certain spending and tax benefits enacted into law. 524 U.S. at 436. The substantive scope of authority delegated by the Line Item Veto Act was no broader than delegations the Court had approved in past cases, as the dissenting justices noted. *See id.* at 468–69 (Scalia, J., dissenting); *id.* at 485 (Breyer, J., dissenting). The Act's constitutional deficiency was the procedure by which the delegated

power was to be exercised. *Id.* at 448 ("[O]ur decision rests on the narrow ground that the procedures authorized by [the Act] are not authorized by the Constitution.") (majority op.). The statute required the President to make a one-time, irrevocable decision regarding tax and spending provisions within five days of enactment. *Id.* If the President canceled an item, it ceased to have "legal force or effect." *Id.* at 438. And unlike other statutory delegations, the President and his successors did not "remain free to change their minds over time concerning the best way to execute the statute." Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1389 (2001)). In short, the procedure was "the functional equivalent of a partial repeal" of a statute, and the Court concluded that kind of power can be exercised only by Congress and only through lawmaking process set forth in Article I, § 7. *City of N.Y.*, 524 U.S. at 441.

2. In each of these cases, the Court has rigorously enforced structural limitations on excessive delegation. That is no accident. This Court has appeared to recognize that where it cannot or will not enforce substantive limitations on delegations of lawmaking power, it must at least insist that that power be channeled through constitutionally appropriate procedures. Even if judges struggle to distinguish executive and legislative power, they are well-equipped to police procedural rules that govern how and by whom federal power can be exercised—"the carefully crafted restraints spelled out in the Constitution." *Chadha*, 462 U.S. at 959; *see also* Clark, 79 TEX. L. REV. at

1385–86 ("Although it [can be] difficult to ... characterize policymaking discretion as either executive or legislative power in the abstract, the identity of the actor exercising such power largely determines its constitutionality"). And because those "carefully crafted constraints" serve important constitutional interests—including the protection of individual liberty, political accountability, regard for minority rights, and federalism—enforcing those indirect means of limiting governmental power can supplement lax policing of direct substantive limitations on legislative power.

Viewed as a structural limitation on delegation, the rule against private delegations is an obvious case for robust enforcement for two reasons rooted in the Court's separation-of-powers jurisprudence.

First, policymaking by private parties is stripped of *all* "auxiliary precautions" that redound to our protection. THE FEDERALIST NO. 51, at 319. Unlike administrative agencies, private entities are led by individuals who swear no public oaths; cannot be impeached; cannot have their decisions overruled by the President; and need not subject their decisionmaking process to judicial review—to name but a few differences.

One particular danger raised by private delegations is that "special interests could be favored at the expense of public needs," *Chadha*, 462 U.S. at 950. The Framers addressed this threat not by pretending to shut out "various and interfering interests," but rather by designing a constitutional system in which private interests would be moderated or balanced by countervailing private

interests. THE FEDERALIST NO. 10, at 73–74. As a result, narrow factions would tend to be outvoted or forced to form broader coalitions to pursue their interests. That balance is grossly upended, however, when Congress lodges regulatory power *directly* in the hands of a favored private party—particularly a member of the regulated industry itself. *See id.* at 74 ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment.").

As this Court and other courts have recognized, such delegations heighten the risk of rent-seeking and other forms of self-serving regulation. *See Carter Coal*, 298 U.S. at 311 (noting the danger of placing regulatory authority in the hands of private parties whose interests are "adverse to the interests of others in the same business"); *Pittston Co. v. United States*, 368 F.3d 385, 398 (4th Cir. 2004) (noting the danger that private-party regulators could "use their position for their own advantage [and] to the disadvantage of their fellow citizens"); *see also State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.*, 254 P.2d 29, 36 (Cal. 1953) (noting that the "practical tendency" of private-party delegations "is to create and foster monopoly, to prevent, not to encourage competition, to maintain maximum, not minimum prices, all of which is against, not in aid of, the interest of the consuming public") (quoting *Becker v. State*, 185 A. 92, 100 (Del. Super. Ct. 1936)). And as the courts of appeals correctly held, "[n]othing about the government's involvement in Amtrak's operations restrains the corporation" from issuing regulations that "inure to its own financial benefit rather than the common good." Pet. App. 20a.

Second, when a private party exercises quasi-lawmaking power on an equal basis with an administrative agency, its actions are not incidental to *any* assigned constitutional function. The Court has explained that "[w]hen any Branch acts, it is presumptively exercising the power the Constitution has delegated to it." *Chadha*, 462 U.S. at 951. But a private party clothed with federal power is not "presumptively act[ing] in an executive or administrative capacity as defined in Art. II" or in a judicial capacity as defined in Article III. *Id.* Instead, it is presumptively acting in an extraconstitutional capacity.

What, then, can legitimize federal regulatory activity by a private party? This Court's precedents and the decision below disclose a straightforward answer: Private entities in a regulatory role must "function subordinately" to the Executive Branch. *Sunshine Anthracite*, 310 U.S. at 399; Pet. App. 14a (noting the "principle that private parties must be limited to an advisory or subordinate role in the regulatory process"); *accord Pittston Co.*, 368 F.3d at 394–97 ("Congress may employ private entities for ministerial or advisory roles, but it may not give these entities governmental power over others."); *United States v. Frame*, 885 F.2d 1119, 1128–29 (3d Cir. 1989), *abrogated on other grounds by Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). When private regulatory activity is not subject to the full control and supervision of the Executive Branch, it operates outside constitutional checks and balances.

PRIIA violates that bright-line rule by making Amtrak a "co-author" (in the government's words) of the metrics and standards regulation. U.S. CADC Br. at 18. It is no answer to say that Amtrak's rulemaking authority appears modest in scope compared to many regulatory delegations, just as the narrow scope of the review board's power in *Metropolitan Washington Airport Authority* could not save that constitutional violation. *See* 501 U.S. at 277. The danger raised by this case is the statute's basic "blueprint" for exercise of regulatory power outside its "constitutionally confined" channels. *Id.*

If the constitutional bar against private delegations is weakened, there will be no backstop in this Court's nondelegation jurisprudence to limit the breadth of discretionary power that private parties could wield. If, as the government contends, private entities may permissibly co-author regulations on an equal basis with a federal agency, then Congress can also authorize them to co-regulate broadcast licensing as "public interest, convenience, or necessity" require, *Nat'l Broad.*, 319 U.S. at 225, or to co-regulate charging of "excessive" profits, *Lichter v. United States*, 334 U.S. 742, 785 (1948), or to co-regulate "just and reasonable" rates in the energy sector, *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600–03 (1944). This Court's underenforcement of the conventional nondelegation doctrine makes it critically important to honor the Constitution's limitations on how and by whom delegated power can be exercised.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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September 29, 2014

AMICUS CURIAE BRIEF

No. 13-1080

In the

Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, et al.
Petitioners,

v.

ASSOCIATION OF AMERICAN RAILROADS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

Whether Congress may constitutionally delegate legislative authority to a private entity, make delegations not bound by an intelligible principle, and create Officers of the United States who are not subject to removal by the President.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, the Claremont Institute's Center for Constitutional Jurisprudence,[1] is dedicated to upholding the principles of the American Founding, including the individual liberties the Framers sought to protect by adoption of the Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012); *Christopher v. SmithKline Beecham, Corp.*, 132 S. Ct. 2156 (2012); and *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 (2012), to name a few.

The Center is vitally interested in preserving the constitutional structure of government with enumerated powers, separated between constitutional actors. This case tests the proposition that Congress must circumscribe delegations of authority to the Executive Branch by an intelligible principle. It further presents the Court for the first time with the question of whether an "arbitrator" granted the powers of government is an officer of the United States who must be subject to the President's power of re-

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Copies of those consents have been lodged with the clerk.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

moval. As we drift further from the principles of government that were enshrined in our Constitution, we endanger the core mission of the Constitution of preserving individual liberty.

SUMMARY OF ARGUMENT

The United States concedes that the statute at issue must be given a limiting construction in order to avoid constitutional infirmity. Acknowledging the ruling of the court below that the statue could be read to allow delegation of government power to a private arbitrator, the United States argues that this Court should reform the statute with a "limiting construction." This ignores the fact that the statute is silent on whether the arbitrator is a government or private actor. It is silent on the qualifications of the arbitrator. It is silent on how the Surface Transportation Board should choose the arbitrator. It is silent on how the arbitrator should conduct proceedings or whether to conduct proceedings at all. It is silent on who, if anybody, can participate in any arbitration proceedings that the arbitrator may choose to hold. It is silent on factors the arbitrator should apply in reaching a decision. In other words, the statute is utterly devoid of any intelligible principle to guide the process of selection of the arbitrator and conduct of arbitration proceedings.

Once chosen, the statute vests the arbitrator with unbridled discretion to exercise significant government power in setting the metrics that are at issue in this case. Under this scheme, the arbitrator is an "officer of the United States." Congress failed, however, to create a mechanism for removal of the

arbitrator for any cause. Neither the Board nor the President has authority under this statue to terminate the arbitrator. This scheme violates separation of powers.

ARGUMENT

I. The Non-Delegation Doctrine Demands, at the Minimum, that Congress Limit Delegations by Setting Out an Intelligible Principle to Guide the Executive Agency

The Constitution describes a federal government of limited, enumerated power. If a power is not enumerated, it is reserved to the states or to the people by the Tenth Amendment. Moreover, even when dealing with subjects that are among the enumerated powers granted to Congress, Congress does not have authority to delegate its own power to another entity. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). As John Locke notes, legislatures have the power to make laws, not legislators. John Locke, THE TWO TREATISES OF CIVIL GOVERNMENT, Book II, §141(Hollis Ed. (1764)) (Liberty Fund Online Library at 156).

This restriction on Congress is not based solely on the description of its enumerated power. The specific enumeration of power to each branch of the national government was meant to separate and equalize power between the branches. The founding generation paid attention to the warning of Montesquieu that the union of legislative and executive power is a grave danger to liberty. James Madison, THE FEDERALIST NO. 47 (Clinton Rossiter, Ed. (1961)) at 301-02. There is a special concern, therefore, when pow-

er is transferred from the legislative to the executive branch.

This does not mean that Congress must fill in every detail in every statute, or that it cannot grant the Executive Branch the flexibility necessary to accomplish the Congressional objective. Congress must, however, establish for itself "the standards of legal obligation, thus performing its essential legislative function." *Schechter Poultry*, 295 U.S., at 530.

The Court now describes this "standards of legal obligation" formula as an "intelligible principle to which the person or body authorized to [promulgate regulations] is directed to conform." *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). Congress sets the policy and the executive branch administers the law within the confines of that policy.

Since the decision in *Schechter Poultry*, this Court has approved delegations constrained by seemingly broad and largely undefined policy statements. *E.g., American Power & Light Co. v. Securities and Exchange Commission*, 329 U.S. 90, 104 (1946) (authorizing SEC to ensure company structure was not unfair or inequitable); *Yakus v. United States*, 321 U.S. 414, 420, 423-26 (1944)(the constraining policy required the agency to be fair and equitable); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943)(requirement that the agency act in the "public interest" was a sufficient constraint). Indeed, this Court has gone so far as to suggest that it will not "'second guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *Whitman v.*

American Trucking Association, 531 U.S. 457, 474-75 (2001).

In each of these cases, however, the Court recognized that Congress had set down the policy for the executive to follow. Although broad, the policy or intelligible principle was still discernable. For instance, in *National Broadcasting* the Court upheld a statute authorizing the Federal Communications Commission to regulate the licensing of radio broadcasting under the Communications Act of 1934 based on "public interest, convenience, or necessity." *National Broadcasting*, 319 U.S., at 216. This Court ruled that the "public interest" standard was sufficiently concrete because the term is interpreted within the context of the statute. *Id.* It cannot be interpreted as granting the Commission "unlimited power," but must be viewed in the context of the limited radio spectrum and the interest of the public in effective use of the scarce resource. *Id.* In short, Congress had determined the scope of the "public interest" that guided the Commission's regulation.

The same is true of the statutory grant upheld in *Whitman*. There, this Court approved a delegation to "EPA to set air quality standards at the level that is 'requisite'" to protect public health. *Whitman*, 531 U.S. at 475-76. That standard was sufficient because the term "requisite" in that context was definable as "not lower or higher than is necessary—to protect the public health with an adequate margin of safety." *Id.*, at 475-76. The "intelligible principle" standard is not stringent or difficult for Congress to meet. But this Court has not approved a delegation without any

intelligible principle whatsoever.[2] *A.L.A Schechter Poultry*, 295 U.S., at 541-42 ("Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935) (statute giving the President "unlimited authority to determine the policy" is beyond Congress' power to enact).

The arbitration provisions of this statute contain no legal standards or intelligible principles. The Surface Transportation Board appoints arbitrator after Amtrak, the Federal Railroad Administration, or any party involved in the development of the standards requests the appointment. The arbitrator is empowered to issue a decision binding both Amtrak and the federal government (and private railroads who share their tracks with Amtrak) on the metrics and standards. That is the sum total of the meaning that can be squeezed out of this statute regarding the Board's selection of the arbitrator and the arbitrator's decision.

The lack of congressional guidance is highlighted by the United States' concession that this Court can invoke "principles of constitutional avoidance" to give this statute a "narrowing" construction that would prohibit the Board from selecting a private in-

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[2] As Justice Thomas has noted, "the Constitution does not speak of 'intelligible principles.' Rather, it speaks in much simpler terms: 'All legislative Powers herein granted shall be vested in a Congress.'" *Whitman*, 531 U.S., at 487 (Thomas, J., concurring). Since this statute contains no principle, intelligible or otherwise, there is no need for the Court in this case to determine whether the intelligible principle doctrine is itself inconsistent with the Constitution.

dividual as the arbitrator.[3] Appellants' Brief at 29. However, a narrowing construction is only necessary if the statute itself provides no guidance on the question. This statute is silent not only on the status of the arbitrator (private or government), but also on the selection process and factors guiding the arbitrator's decision.

The United States urges that this Court can use the doctrine of constitutional avoidance to "construe" this statute as permitting the appointment of only a government arbitrator. That is of little help here, however. There is no Office of Federal Arbitrators to whom the Surface Transportation Board can turn. The Board will have to decide whether it can appoint an official of the Federal Railroad Administration (one of the parties to the arbitration) as the arbitrator, or whether it must seek a federal arbitrator from some other agency. Assuming the Board wants an arbitrator from within the Department of Transportation, does it pick someone from the Federal Aviation Administration, the Federal Motor Carrier Safety Administration, or the National Highway Traffic Safety Administration? The statute does not say.

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[3] The United States suggests that this Court in *Schechter* did not criticize the statute for its delegation of government power to private entities. Appellants' Brief at 20 n.5. This is a serious misreading of that decision. As this Court noted: "Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? ... The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress." *ALA Schechter*, 295 U.S., at 537. The Court did not base its ruling on that issue since the statute delegated the power to the President rather than the trade associations. *Id.*

Can anyone challenge the selection of the arbitrator? The statute is silent.

Once the Board chooses the arbitrator, how does the arbitration proceed? There is no guidance in the statute. Must the arbitrator take evidence or consider the positions of Amtrak, the Federal Railroad Authority, or private railroads? How does the arbitrator reach a decision? What factors guide the exercise of discretion in setting the metrics and standards? Again, the statute is silent.

The only thing that is clear is that there is no appeal from the arbitrator's decision. The statute characterizes the arbitration as "binding." The statute gives the arbitrator the power to bind Amtrak, the Federal Railroad Authority, the Surface Transportation Board, and the private railroads whose tracks Amtrak shares. Congress provided no guidance, however, for that decision. Congress provided no direction for how the Board should select the arbitrator. Congress provided no guidance for how the arbitration should proceed. The statute lacks any semblance of an "intelligible principle" that could guide the exercise of agency discretion. This lack of guidance renders the statute unconstitutional.

II. The Arbitrator in this Statutory Scheme Is an Officer of the United States Who Must Be Subject to Removal by the President

This Court has yet to address whether Congress can turn over government decision-making to an arbitrator empowered to make binding (nonappealable) decisions. Under this statute, the arbitrator's decision binds not only Amtrak, a private entity, but also the Federal Railroad Administration and, by exten-

sion, the Surface Transportation Board. The arbitrator's decision remains in effect until Congress enacts a new law. Congress did nothing to limit the arbitrator's discretion or even to dictate the procedure that the arbitrator must use. Once appointed the arbitrator answers to no agency of government and is apparently not subject to removal. Because of the significant authority to bind both the government and private parties to his decision, the arbitrator described in the statute is an officer of the United States and must be subject to removal by the President.

Older decisions of this Court defined "officer" by "tenure, duration, emolument, and duties" and required the position to be "continuing and permanent." *United States v. Germaine*, 99 U.S. 508, 511-12 (1879). Later decisions, however, have discarded the requirement of "permanence." *See Morrison v. Olson*, 487 U.S. 654, 672-73 (1988) (special prosecutor whose appointment is limited to a particular case is an inferior officer); *United States v. Eaton*, 169 U.S. 331, 343 (1898) (a vice-consul with a temporary appointment to perform functions of consular office is an inferior officer); *Ex Parte Siebold*, 100 U.S. 371, 397-98 (1880) (elections officers appointed to supervise an election are inferior officers).

Instead of duration of the position, the Court now focuses on whether the individual in question exercises "significant authority." *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976). The officer who exercises significant authority is distinguished from mere employees characterized as "lesser functionaries." *Id.*, at 126, n.162. By contrast, a principle officer is not subject to the control or direction of any other au-

thority. *Id.* An inferior or subordinate officer is one "whose work is directed and supervised at some level by others who were appointed by Presidential nomination." *Edmund v. United States*, 520 U.S. 651, 663 (1997).

The statute under review in this case grants the arbitrator "significant authority." The arbitrator is empowered to issue a final and binding decree setting the metrics that Amtrak must meet and that dictate track usage by all freight lines whose tracks Amtrak uses. The metrics also bind the United States. The Federal Railroad Administration cannot impose any metrics that differ from the arbitrator's decision and the Surface Transportation Board must use those metrics as the basis for its investigations and decisions.

There is no appeal from the arbitrator's decision. Unlike agency rulemaking, the Administrative Procedure Act does not apply to the arbitrator. Thus, there is no public comment. There is no notice of the proceeding in the Federal Register. Significantly, there is no judicial review. Instead, the arbitrator issues a ruling that binds both the government and the rail industry. This is significant authority.

Under this statute, the arbitrator is not subject to any supervision at all. Nonetheless, the single focus and temporary nature of the appointment show that the arbitrator fits best as an inferior or subordinate officer rather than a principle officer. *See Morrison*, 487 U.S., at 673; *Eaton*, 169 U.S., at 343. Even as an inferior officer, however, the arbitrator must still be subject to the President's supervision.

Article II gives the President control of the Executive Branch of the national government. That power of administration necessarily includes some power of removal. *Free Enterprise Fund v. Public Company Accountancy Oversight Board*, 561 U.S. 477; 130 S. Ct. 3138, 3152 (2010). Although this Court has held that Congress can *limit* the President's power of removal by protecting the tenure of subordinate officers with a good cause requirement for removal, Congress cannot completely insulate even subordinate officers from Presidential supervision. *Id.*, at 3155. Just as Congress may not delegate legislative authority, it similarly has no power to invest executive authority in an officer not subject to the President's supervision. This Court noted in *Free Enterprise Fund*: "The Framers did not rest our liberties on ... bureaucratic minutiae." *Id.*, at 3156. Instead, they established a structure where the President was answerable to the people for the actions of the Executive Branch. Congress may not disrupt this constitutional scheme by insulating executive officers from presidential supervision.

The statute before the Court does not contemplate removal of the arbitrator once appointed. There is no power in the Surface Transportation Board to revoke the appointment. Once the Board makes the appointment, it must wait for the decision that will bind it, the Federal Railroad Authority, and the private railroads with whom Amtrak shares track. The Board can take no other action. Statutory silence cannot grant removal power. *United States v. Perkins*, 116 U.S. 483, 484-85 (1886).

Congress created an "officer of the United States" in this statute, but failed to provide for re-

moval of that officer. Because Congress insulated the officer supervision by the President, the statute is unconstitutional.

CONCLUSION

It has been nearly 80 years since this Court upheld a nondelegation challenge. During that time this Court has granted significant leeway to Congress to vest discretion in the Executive so long as Congress set forth some discernable policy, some intelligible principle. Congress has failed to set forth the required standard of legal obligation in this case. The statute authorizes both the Federal Railroad Authority and a private company to delegate to an arbitrator the power to render a decision binding on both the government and private parties. Congress failed to set down any principle, however, for selecting the arbitrator or for how the arbitrator is supposed to exercise his power.

Because the statute grants the arbitrator significant powers, the arbitrator is an officer of the United States. The statute provides no means for removal of the arbitrator, however. The arbitrator is free from the supervision of the one person tasked with

the constitutional duty to faithfully execute the law – the President. This insulation of the arbitrator violates separation of powers.

DATED: September, 2014.

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BRIEF OF THE CENTER FOR THE RULE OF LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Center for the Rule of Law, chaired by the Honorable Ronald A. Cass, is a non-profit organization dedicated to educating the public about issues affecting the rule of law. The Center's legal scholars and policy experts analyze the rule of law dimensions in matters ranging across regulation, litigation, international trade rules, competition law, property rights, intellectual property, securities and corporation law, administrative and constitutional law, and other governmental decisions. Scholars affiliated with the Center have special expertise and background in administrative law and constitutional law issues implicated in this litigation, with one scholar having taught and written about related issues for more than 35 years and several other scholars having interest in cognate issues.

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[1] The parties have consented in writing to the filing of this brief, and their letters of consent have been filed with the Clerk. No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund its preparation or submission.

SUMMARY OF ARGUMENT

By the Government's telling, *Carter Coal* is little more than an historical oddity: "It has been nearly 80 years since this Court invalidated an Act of Congress on the ground that it delegated too much authority to a private party." Gov't Br. 20; (citing *Carter* v. *Carter Coal*, 298 U.S. 238 (1936)). That tightly cropped portrait of history neglects the broader, deeper context in which *Carter Coal* is rooted: the Court's structural constitutional jurisprudence.

For 80 years, issues of "delegation" have been bound up with issues of government structure, and vice versa. In scrutinizing statutory delegations of power, the Court has been mindful of the delegatee's structure and nature. Conversely, in scrutinizing the structural "independence" of agencies and officials, the Court has been mindful of the breadth and nature of powers delegated to the agency or official.

These intertwined doctrines reflect a common principle: the greater a rule-maker's independence from legislative and executive oversight, the greater the need for judicial scrutiny of Congress's delegation of power to that rule-maker. That is why delegation of rule-making power to private parties is "delegation in its *most* obnoxious form": because it vests power in the least accountable rule-makers. *See Carter Coal*, 298 U.S. at 311 (emphasis added). As Publius warns, if laws become the product of self-interested private actors' unilateral acts, rather than of constitutional checks and balances, then law will be written not "with a sole regard to justice and the public good," but with regard to the rule-maker's own narrow self-interest. Federalist No. 10 (Madison).

ARGUMENT

I. *Carter Coal* and Other Nondelegation Cases Warn That Congress's Delegation of Rule-Making Power to Private Parties Undermines Constitutional Government and the Public Good

A. *Carter Coal* specifically prohibits Congress from delegating binding rule-making powers to private parties

As Respondent explains, this Court has recognized that delegations of rule-making power to private parties are fundamentally incompatible with the Constitution. Resp. Br. 15-17.[2] In *Carter Coal*, the Court struck down Congress's delegation of rule-making power to factions of coal companies and miners, in the strongest possible terms:

> This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. . . . [O]ne person may not be intrusted with the power to regulate the business of another, and especially of a competitor.

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[2] This brief's discussion of "delegation" is limited to the delegation of the power to make binding rules, and not more generalized conceptions of delegating government functions to private industry. *See* Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 Marq. L. Rev. 449, 498-99 (1988).

298 U.S. at 311. The Court's analysis also touched on themes of liberty and due process, *see id.* at 311, but its holding was rooted first and foremost in *Schechter Poultry*'s nondelegation doctrine, *id.* at 310-12 (citing *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 537 (1935)).

Schechter Poultry is best known for holding that Congress may not delegate open-ended lawmaking power to the Executive Branch, 295 U.S. at 542, a test closely related to the Court's modern "intelligible principle" standard, *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928)). But the Court reached that issue in *Schechter Poultry* only after rejecting the Government's argument that "codes of competition" promulgated under the National Industrial Recovery Act would be written largely by industry, rather than by the President with unlimited discretion. 295 U.S. at 537. In other words, the Government downplayed the specter of excessive delegations of power to the President by urging that power really was being wielded by private parties instead.

The Court rejected that argument emphatically. Asking whether it can "be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups," the Court found the answer to be "obvious": "Such a delegation of legislative power is unknown to our law, and is

utterly inconsistent with the constitutional prerogatives and duties of Congress." *Id.*[3]

Subsequent cases clarified the precise rule that the Court drew in *Carter Coal*, but they did not detract from it. For example, while Congress cannot delegate rule-making power to private parties, it can turn to private parties to help the government formulate rules. In *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), the Court held that a government agency, the National Bituminous Coal Commission, could rely on the assistance of private industry groups, the Bituminous Coal Code's "district boards of code members," before formulating fair-competition standards. *Id.* at 387-88, 399. This statutory arrangement, enacted in the aftermath of *Carter Coal*, did not "delegate [Congress's] legislative authority to the industry," because the Commission,

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[3] The Government downplays this part of *Schechter Poultry*, suggesting that the Court's rejection of delegating rule-making power to private parties "rested to a significant extent on the 'virtually unfettered' nature of the delegation to the President, rather than just the involvement of private parties." Gov't Br. 20 n.5. In fact, those were two separate, sequential holdings. First, the Court rejected the delegation of rule-making power to private parties. 295 U.S. at 537. Second, the Court held that "the discretion of the President" under the statute, which was "virtually unfettered," was itself "an unconstitutional delegation of legislative power." *Id.* at 542. *See also Yakus* v. *United States*, 321 U.S. 414, 424 (1944) (explaining that *Schechter Poultry* involved the delegation of power "not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated").

"not the code authorities, determine[d] the prices." *Id.* at 399. Indeed, Congress had taken care in 1937 to keep ultimate rule-making power in the hands of the Commission, and out of the hands of private interests, precisely because of the Court's holding in *Carter Coal*. Robert E. Cushman, *The Independent Regulatory Commissions* 387 (1972); *see infra* n.8 (on Congress's response to *Carter Coal*).

Similarly, the Court held that the nondelegation doctrine does not prohibit Congress from using a vote of the regulated parties to trigger implementation of agency regulations. In *Currin* v. *Wallace*, the Court considered a provision of the Tobacco Inspection Act that would delay implementation of Agriculture Department regulations within "a given market" until "two-thirds of the growers" endorsed it. 306 U.S. 1, 15 (1939). The Court distinguished the *formulation* of regulatory standards from the determination of when those standards would go into effect: the former was held to be an exercise of "legislative authority," but the latter was not. *Id.* at 15-16 ("[T]he required referendum does not involve any delegation of legislative authority . . . Here it is that Congress exercises its legislative authority in making the regulation and in prescribing the conditions of its application."). The Court reiterated this point, with little additional comment, in *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, 577-78 (1939) (citing *Currin*, 306 U.S. at 15).[4]

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[4] But as Justice White observed in *INS* v. *Chadha*, the unconstitutionality of "one-House vetoes" raises substantial questions about *Currin*'s and *Rock Royal Co-op.*'s continuing viability. *INS* v. *Chadha*, 462 U.S. 919, 986-87

But in drawing those distinctions, the Court reaffirmed *Carter Coal*'s core principle: that to delegate binding rule-making power to private parties is to elevate private parties from mere participants in the regulatory process to the status of regulators themselves—that is, "to abdicate, or to transfer to others, the essential legislative functions with which [Congress] is vested by the Constitution." *Currin*, 306 U.S. at 15 (citing, *inter alia*, *Schechter Poultry*, 295 U.S. at 529); *see also* Gillian E. Metzger, *Privatization as Delegation*, 103 Colum. L. Rev. 1367, 1439 (2003) ("In neither *Currin* nor *Sunshine* did the Court overrule *Carter*. Instead, it held that, unlike *Carter*, these cases did not involve delegation of legislative power to private actors.").

B. *Carter Coal* exemplifies the Court's practice of scrutinizing more strictly Congress's delegation of powers that substantially expand the delegatee's own traditional powers

Carter Coal was decided in the wake of the Court's two seminal "nondelegation" cases. In *Panama Refining*, the Court invalidated a delegation of rule-making power that was so standardless that it effectively "vested in the President" the entire "legislative power" to regulate oil markets. *Panama*

(1983) (White, J., dissenting). The questionable legitimacy of Congress delegating even authority over timing (not content) of legally binding rules, after *Chadha*, reinforces the arguments made here and the concerns expressed here regarding Congress's delegation of rule-making power to private parties.

Refining Co. v. *Ryan*, 293 U.S. 388, 420-21 (1935). In *Schechter Poultry*, the Court invalidated Congress's attempt to delegate to the President "virtually unfettered" rule-making power. 295 U.S. at 541-42. When the Court decided *Carter Coal* the following year, its nondelegation analysis was no radical jurisprudential innovation, but rather a straightforward application of the Court's nondelegation precedents.[5]

When the Government downplays the relationship between *Carter Coal* and broader nondelegation doctrine concerns, *see* Gov't Br. 20-26, it does more than simply ignore *Carter Coal*'s jurisprudential genealogy. It deprives the case of crucial context—namely, the body of subsequent nondelegation cases illustrating how the Court scrutinizes Congress's delegations not just in terms of the specific powers

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[5] This Court's decision three years later, in *Currin* (the aforementioned industry-vote case), illustrates how unexceptionally *Carter Coal* fit within the Court's nondelegation jurisprudence. *Currin*'s analysis of the private-delegation issue began not with reference to *Carter Coal*, but with *Panama Refining*'s prohibition against "abdicat[ing] or transfer[ring] to others the essential legislative functions with which it is vested by the Constitution." *Currin*, 306 U.S. at 15 (citing *Panama Refining*, 293 U.S. at 421 ("The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.")). Only after discussing *Panama Refining* and *Schechter Poultry* did the *Currin* Court finally make but a passing reference to *Carter Coal*. *Id.* at 15-16 (citing *Carter Coal*, 298 U.S. at 310, 318). In short, the Court saw *Carter Coal*'s nondelegation rule not as *sui generis*, but as an integral part of nondelegation jurisprudence as a whole.

delegated by Congress, but also in light of the *delegatee's* particular nature, structure, and traditional powers. Specifically, when Congress delegates powers going well beyond the powers and functions traditionally held by the delegatee, the Court scrutinizes the delegation more strictly. By contrast, when Congress delegates powers that are unexceptional in the context of the particular delegatee, the Court's scrutiny is relaxed.

Carter Coal presents the clearest example of the Court's nondelegation analysis focusing on the nature of the delegatee: because the delegatees were private parties, the Court applied the strictest possible scrutiny, categorically forbidding the delegation of binding rule-making power to them. But other "nondelegation" cases after *Panama Refining* and *Schechter Poultry* also illustrate how the Court tailors the nondelegation inquiry in light of the nature of the delegatee.

In *United States* v. *Mazurie*, 419 U.S. 544 (1975), the Court reviewed Congress's delegation of broad rule-making power to Indian tribes, for the regulation of alcohol. Applying *Panama Refining*, the Court stressed that the nondelegation doctrine's "limitations are . . . less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *Id.* 556-57. When the Court affirmed that delegation, it did so in part because the structural concerns that animated *Carter Coal* were at a minimum: the newly delegated federal powers did not differ substantially from other powers properly held by the tribe. *Id.* at 557.

Similarly, in *Loving* v. *United States*, when the Court reviewed Congress's delegation of power to the President to define aggravating factors that would affect sentencing in military trials, it focused on the fact that such discretion fit well within "the traditional authority of the President." 517 U.S. 748, 771-72 (1996). Had Congress delegated to the President powers "call[ing] for the exercise of judgment or discretion that lies beyond the traditional authority of the President," a nondelegation challenge to the statute "might have more weight." *Id.* at 772. But because "the delegated duty" was "interlinked with duties already assigned to the President by express terms of the Constitution," the nondelegation scrutiny was relaxed. *Id.* at 772-73; cf. *Whitman*, 531 U.S. at 475 ("the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred").[6]

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[6] The Court has undertaken a similar approach in cases challenging Congress's decision to vest non-Article III tribunals with the power to adjudicate claims. In *CFTC* v. *Schor*, 478 U.S. 833 (1986) the Court affirmed Congress's delegation of power to the Commodity Futures Trading Commission to adjudicate state law counterclaims in the agency's reparations proceedings, after concluding, *inter alia*, that CFTC's exercise of authority implicated only "a narrow class of common law claims" in a "particularized area of law" (*id.* at 853-54); that Congress had vested this power in the CFTC merely to effectuate "a specific and limited federal regulatory scheme" rather than a wholesale allocation of judicial power (*id.* at 855); that the inclusion of state law counterclaims in such proceedings was necessary for the federal system to function workably (*id.* at 856); and that the CFTC's decisions would be

If such powers delegated to the President lie at one end of the nondelegation doctrine's spectrum, then rule-making powers delegated to private parties lie at the other. The power to make broadly applicable, binding rules is not "interlinked with duties already assigned to" private parties, *Loving*, 517 U.S. at 772, because the Constitution assigns private actors *no* comparable lawmaking duties.

These broader nondelegation principles are all the more relevant when the Government attempts to sidestep *Carter Coal* by asserting that the delegatee in this case is "not . . . *merely* a private entity." Gov't Br. 16 (emphasis added). The nondelegation concerns voiced in past decisions do not conform to a binary test—an "on-off" switch—preventing all delegations of authority to purely private entities but permitting all delegations of authority to any other entity. Even if, *arguendo*, Amtrak could be deemed to bear both

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"enforceable only by order of the district court" (*id.* at 853). By contrast, in *Stern* v. *Marshall* the Court held that bankruptcy courts' statutory jurisdiction over state law claims was unconstitutional, because the bankruptcy courts' exercise of this power was not comparably limited. 131 S. Ct. 2594, 2613-15 (2011). Whether *Schor* remains good law or not in light of the questions raised by subsequent decisions, *see* Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 609-610 (2007), the Court's inquiries in *Schor* and *Stern* are instructive in focusing on the context and limits respecting the particular authorization of decisional power.

private and government characteristics,[7] the Court still must evaluate the constitutional propriety of Congress's delegation of rule-making powers in light of those facts. When the delegatee exists to "be operated and managed as a for-profit corporation," and not as a "department, agency, or instrumentality of the United States Government," 49 U.S.C. § 24301(a), then Congress's delegation of broad rule-making power to that delegatee must be reviewed with exacting scrutiny.

II. The Constitutional Bar Against Delegating Binding Rule-making Power to Private Parties Is Reinforced By the Court's Separation-of-Powers Decisions

The principles underlying *Carter Coal* and the broader nondelegation doctrine are reflected also in a parallel body of constitutional caselaw: the Court's separation-of-powers cases. In analyzing the constitutionality of "independent" agency structures, the Court pays special attention to the breadth of powers delegated to the agency. The greater the scope of the delegated power, the more important it is for the agency to be structurally responsive to constitutional checks and balances.

In *Free Enterprise Fund* v. *Public Company Accounting Oversight Board* (PCAOB), for example, the PCAOB's broad powers figured prominently in the Court's analysis of the PCAOB's structural independence. 130 S. Ct. 2138, 3159 (2010). Congress

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[7] The Center for the Rule of Law takes no position in this *amicus* brief on the issue of Amtrak's "private" or "public" status.

had empowered the PCAOB "to take significant enforcement actions . . . largely independent of" the Securities and Exchange Commission." *Id.* Congress had given the PCAOB "significant independence in determining its priorities and intervening in the affairs of regulated firms (and the lives of their associated persons) without Commission preapproval or direction." *Id.* In sum, Congress had made the PCAOB "the regulator of first resort and the primary law enforcement authority for a vital sector of our economy"—and the Court held that these were powers too great for an agency enjoying the double measure of structural "independence" from Presidential control that Congress had provided to it. *Id.* at 3161.

By contrast, in *Morrison* v. *Olson* the Court was more comfortable with the Independent Counsel's structural independence from the Attorney General and President, not just because that independence was less comprehensive than in *Free Enterprise Fund*, but also because the power delegated to the Independent Counsel was more limited than the power later delegated to the PCAOB. 487 U.S. 654, 691-92 (1988). Because Congress gave the Independent Counsel only "limited jurisdiction and tenure," with no "policymaking or significant administrative authority," the Court determined that the Act did not undermine the President's executive power. *Id.*; *see also id.* at 696 (explaining that the Independent Counsel's authority "is defined with reference to the facts submitted by the Attorney General," and she must "abide by Justice Department policy unless it is not 'possible' to do so").

The Court employed a similar approach in *Mistretta* v. *United States*, where it held that Congress did not violate the Constitution's separation of powers by "locat[ing]" the Sentencing Commission, an "independent agency," "within the Judicial Branch." 488 U.S. 361, 395-96 (1989). The Court recognized the theoretical risks of conferring too much "political authority" upon "a nonpolitical Branch," *id.* at 396, but it concluded that the Commission's policymaking powers were in fact quite limited: "they do not bind or regulate the primary conduct of the public or vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime. They do no more than fetter the discretion of sentencing judges"—powers of such "limited reach" that they could be vested within the Judiciary rather than in a branch more responsive to the public will. *Id.* at 396.

The modern doctrines of agency "independence" and nondelegation were in some respects born on the same day in 1935. *Humphrey's Ex'r* v. *United States*, 295 U.S. 602 (1935); *Schechter Poultry*, 295 U.S. 495 (1935). Decades later, the twin doctrines' continued relationship informs this case. By recognizing that increased delegations of agency power may require increases in structural accountability, the Court further illustrates the inherent dangers of delegating broad rule-making power to the most independent actors of all—self-interested private parties.

III. Delegation of Binding Rule-making Power to Private Parties Is Unnecessary, Because Congress Can Give Private Parties a Voice Without Making Them Lawmakers

The Government highlights the absence of decisions of the Court striking down delegations of binding rule-making power to private parties, Gov't Br. 20, but it fails to recognize the reason for that dearth of cases: after *Carter Coal*, Congress stopped delegating such powers to private parties. In the 1937 Bituminous Coal Act, for example, rule-making power was vested in the federal Coal Commission rather than in the private district boards, which were given merely the power to propose regulatory standards. Cushman, *The Independent Regulatory Commissions* at 387.[8]

Indeed, the Supreme Court's decisions in *Panama Refining*, *Schechter Poultry*, and *Carter Coal* caused Congress to recalibrate its delegations of regulatory power in light of "the character and composition of federal agencies that had survived Court scrutiny." G. Edward White, *The Constitution and the New Deal* 112-13 (2000). Congress made subsequent delegations to agencies comprising "independently appointed officials, none of whom

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[8] *See also Sunshine Anthracite Coal*, 310 U.S. at 387 (explaining that after *Carter Coal*, the 1937 Act "eliminated those provisions of the earlier Act and made other substantive and structural changes"); Eugene V. Rostow, *Bituminous Coal and the Public Interest*, 50 Yale L.J. 543, 570 (1941); Reuben Oppenheimer, *The Supreme Court and Administrative Law, 1936-1940*, 5 Md. L. Rev. 231, 241-42 (1941).

were representatives of the industry being regulated," *id.* at 112, and took care to ensure that the agencies' actions would be subjected to thorough judicial review, *id.* at 113. Decades later, the delegation of binding rule-making power to private entities is "novel" precisely because Congress recognized after *Carter Coal* the "severe constitutional problem" with delegating such power to private entities. *Free Enter. Fund*, 130 S. Ct. at 3159 (quoting *Free Enter. Fund* v. *PCAOB*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)).

Decades later, Congress is well experienced in constructing regulatory frameworks that incorporate substantial private involvement without giving the private parties control over the ultimate content of the regulations. Sometimes Congress gives private organizations a strong role in formulating regulatory proposals, but those proposals do not become law without action by the relevant regulatory agency. This is the statutory model for the private "self-regulatory organizations" that oversee securities markets, 15 U.S.C. § 78s(b), and more recently for the private "electric reliability organization" that promulgates national power-grid reliability standards, 16 U.S.C. § 824o(d).

With such alternatives available, Congress does not need to delegate binding rule-making power to private parties, who "have an incentive to select regulation that provides them with maximum benefits without considering the effect on the other regulated parties or the public." Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A*

Delegation Doctrine for the Administrative State, 109 Yale L.J. 1399, 1428 (2000).[9]

Ultimately the nondelegation doctrine preserves the "accountability that is crucial to the intelligible functioning of a democratic republic." John Hart Ely, *Democracy and Distrust* 132 (1980); Ronald A. Cass, *Looking With One Eye Closed: The Twilight of Administrative Law*, 1986 Duke L.J. 238, 246 (1986) ("additional delegation decreases the decisionmaker's incentives to ascertain and implement majority preferences").[10] It counteracts Congress's incentive

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[9] *See also* Daniel J. Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 Minn. L. Rev. 299, 308 (1983) ("It is not surprising that the Court's anti-delegation decisions involved regulatory acts that established cartel-type production controls under effective industry administration."); Federalist No. 10 (Madison) ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."); Ronald A. Cass, *The Rule of Law in Time of Crisis*, 51 How. L.J. 653, 654 (2008) (the rule of law gives all people "confidence that the laws will apply the same way to everyone, regardless of their personal circumstances and regardless of the identity of the person applying the law").

[10] Cf. Federalist No. 70 (Hamilton) ("the two greatest securities [the people] can have for the faithful exercise of any delegated power" are "the restraints of public opinion" and the power to cause officials' "removal from office"); *Printz* v. *United States*, 521 U.S. 898, 923 (1997) ("The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known."); *Free Enter. Fund*, 130 S. Ct. at 3155 ("The

to avoid responsibility for hard policy choices, and it enables citizens to "hold legislators to account when the government fails to provide timely, balanced resolutions of regulatory disputes." David Schoenbrod, *Power Without Responsibility* 196 (1993); *id.* at 99-105; cf. John Hart Ely, *War and Responsibility* ix (1993) (Congress's "legislative surrender [to the Executive Branch] was a self-interested one: Accountability is pretty frightening stuff.").

Accountability evaporates when Congress can delegate power not merely to the President, or even to federal agencies, but to private parties who would craft regulations not with "a sole regard to justice and the public good," but with a sole regard to their own private interest. Federalist No. 10 (Madison). Such delegations must remain safely "unknown to our law," for they are "utterly inconsistent with the constitutional prerogatives and duties of Congress." *Schechter Poultry*, 295 U.S. at 537.

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diffusion of power carries with it a diffusion of accountability.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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September 29, 2014

AMICUS CURIAE BRIEF

No. 13-1080

IN THE

Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

ASSOCIATION OF AMERICAN RAILROADS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

This case concerns such an issue: whether the Constitution permits Congress to delegate legislative power to a private party. Transferring legislative rulemaking authority to a private party to set the rules of the game tempts the creation of self-serving action to tilt the competitive playing field. That danger ensues equally when the entity wielding effective rulemaking power is a government-chartered corporation, endowed with considerable advantages, and created to sell goods or services in the commercial sphere. The statutory provisions at issue here implicate all of these concerns in a vital segment of the economy—freight rail service.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Letters of consent from Petitioners and Respondent have been submitted to the Clerk.

Many American businesses rely upon the nation's rail shippers to carry their goods to destinations throughout the United States. Significantly, railroad track is a finite resource, with both freight- and passenger-rail service competing for track space. Setting standards for rail traffic thus has the potential to impact the ability of the Chamber's members to obtain reliable and low-cost transport for their goods. The Chamber and its members, therefore, have a substantial interest in the resolution of this case.

SUMMARY OF ARGUMENT

The Chamber does not take issue with—and, indeed, avails itself of—many of the mechanisms Congress has created to allow private persons to participate in the rulemaking process. Private parties may, for example, comment on proposed rules. Federal agencies may also turn to private parties for expert consultation. And they may even draft proposed rules, subject to the Government's approval or modification. In all of these cases, however, the Government retains the final say as to the rule's contents.

But the Constitution establishes important restraints on the power of Congress to delegate rulemaking power to private parties. As the D.C. Circuit correctly reasoned, eliminating the Government's exclusive ability to impose final rules or to disapprove or modify privately developed rules transgresses these limits. A grant of rulemaking power to private parties invites one-sided standards and anticompetitive abuses by parties that seek to use their rulemaking authority to gain advantage in the marketplace. These considerations are no different when the private entity is a government-chartered corporation that has been created to act as an independent "for-profit" company in a commercial setting.

Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), however, gives Amtrak—an entity charged with selling commercial services "for-profit"—a rulemaking role *equal* to that of the Federal Railroad Administration (FRA). The final word about what the standards say effectively belongs to both of them, working in collaboration (with any dispute to be resolved by a third-party arbitrator), *not* the Government alone. That this scheme shares some characteristics with provisions upheld in the past—allowing private parties to determine whether government-written rules become effective or to propose rules subject to government approval or change, for example—provides no support for fusing those schemes together and assigning a private party *both* the ability to co-author *and* the ability to prevent the implementation of the Government's preferred rule.

Section 207's delegation of rulemaking power to Amtrak also threatens to harm the Chamber's members by reducing the availability of reliable freight rail service. Given its "for-profit" mission, Amtrak has every incentive to assert its rulemaking authority in favor of passenger service, to the detriment of freight service. Because the Chamber's members collectively rely on freight-rail services to ship vast quantities of goods in an environmentally friendly manner, Amtrak's incentive and ability to act on that incentive risks imposing significant costs and inefficiencies.

The D.C. Circuit's decision invalidating Section 207 as an unconstitutional delegation of rulemaking authority to a private entity properly ensures that Amtrak cannot wield regulatory power over freight shipments and, ultimately, the consumers that purchase them. This Court should affirm.

ARGUMENT

I. THE GOVERNMENT'S POWER TO DELEGATE EFFECTIVE RULEMAKING AUTHORITY TO PRIVATE PARTIES, ESPECIALLY FEDERALLY CHARTERED ONES, IS SHARPLY LIMITED.

There are many different lawful avenues for private involvement in governmental rulemaking. But Congress may not transfer the ultimate control over a rule's contents to a private party. Doing so would constitute an impermissible delegation—abdication—of the Government's sovereign rulemaking authority. This well-established constitutional prohibition protects against the private imposition of self-interested standards and extends equally to government-created corporations operating as private parties in the marketplace.

A. There Are Many Ways For Private Stakeholders Lawfully And Meaningfully To Participate In The Rulemaking Process.

1. Private interests often play a key part in formulating legal rules. For starters, a statute may "contemplate[] that ... standards will be set and revised through notice-and-comment rulemaking." *Chem. Mfrs. Ass'n* v. *Natural Res. Def. Council, Inc.*, 470 U.S. 116, 153 (1985) (Marshall, J., dissenting); see also *United States* v. *Mead Corp.*, 533 U.S. 218, 229–31 (2001). In general, an agency must notify the public of the proposed rule, after which the agency "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c). The Cham-

ber and its members frequently participate in this sort of rulemaking.

In other instances, private parties have even more say over the implementation of Government-formulated rules. Congress has granted members of industry power to vote for or against the execution of proposed standards, for example. See, *e.g.*, 7 U.S.C. § 608c(7)–(9) (Secretary of Agriculture may enter orders governing agricultural commodities in certain situations after determining that the order is approved by at least two-thirds of producers). Elsewhere, the application of rules or the grant of rights has been conditioned on whether a regulated party holds a particular third-party accreditation or certification. See, *e.g.*, 42 U.S.C. § 263a (accreditation from "a private nonprofit organization" can count toward required certification for laboratories handling human body materials); 21 U.S.C. §§ 381(q), 384d(c)(2)(B)(i) (certification for imports from "accredited third-party auditors"); see also *Cospito* v. *Heckler*, 742 F.2d 72, 88–89 (3d Cir. 1984) (hospital accreditations). There, the third-party criterion is at most a condition on whether or not the Government's rule applies.

In addition, Congress has authorized self-regulatory bodies to propose the rules or standards themselves, but ultimately subject to the Government's final approval. In the securities context, for instance, self-regulatory organizations may file proposed rules with the Securities and Exchange Commission, after which the Commission can decide (with input from the public) whether or not to implement the proposal. See 15 U.S.C. § 78s(b)–(c). But "the industry and the government [do not] fulfill the same function in the regulatory framework or ... enjoy the same order of authority or deserve the same degree of

deference, whether by firms, courts or the Congress." S. Rep. No. 94-75, at 23 (1975). Instead, "[t]he self-regulatory organizations exercise authority subject to SEC oversight [and] have no authority to regulate independently of the SEC's control." *Id.*

More generally, "numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government ... are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government." 5 U.S.C. app. 2 § 2(a). Again, however, the governing statute, the Federal Advisory Committee Act, specifies that the committees "should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved." *Id.* § 2(b)(6); see also *id.* § 9(b).

In a similar vein, Congress occasionally authorizes the adoption of privately developed standards as binding rules. But Congress ordinarily requires an executive department or agency to make the final call as to whether a privately set standard should be incorporated into federal law. For example, the Consumer Product Safety Commission "shall rely upon voluntary consumer product safety standards ... whenever compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards." 15 U.S.C. § 2056(b); see also *id.* § 2058(a)(5), (b). Further, only the standards actually approved by the agency are incorporated into federal law, and "[f]uture amendments or revisions of the publication are not included." 1 C.F.R. § 51.1(f). This ensures that

the Government knows and controls what standards are being incorporated.

2. This Court has upheld these sorts of schemes against constitutional challenges. In a series of decisions from the New Deal era, in particular, the Court held that it is constitutional either to allow private parties to oppose the implementation of a government-written standard or to invite private parties to propose standards subject to government approval or modification.

In *Currin* v. *Wallace*, 306 U.S. 1 (1939), for example, the Supreme Court addressed "delegation" concerning tobacco standards. The rules were instituted by the Secretary of Agriculture but their operation could be withheld in a given market "'unless two-thirds of the growers ... favor it.'" *Id.* at 15. As the Government explained, this was not a case in which "the vote of the majority was effective to impose the regulation, uncontrolled by the legislature or by any executive officers." Br. for the U.S., 1938 WL 63974, at *74 (1938). Rather, "the legislation has imposed a regulation and provided merely that it shall not be effective if those primarily affected disapprove its application." *Id.* at *75. This Court agreed that the statute "d[id] not involve any delegation of legislative authority" for that reason. *Currin*, 306 U.S. at 15–16.

United States v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939), was similar. There, the Secretary could enter orders governing milk sales, but whether or not the order became effective in certain circumstances depended on the Secretary's determination that two-thirds of the producers approved. *Id.* at 547–48, 577–78. The Government once more argued that "Congress has exercised its legislative authority by imposing a regulation and prescribing the conditions upon which it shall apply," Br. for the U.S., 1939 WL

48478, at *116–19 (Apr. 17, 1939), and this Court, applying its holding in *Currin*, upheld the constitutionality of the statute, 307 U.S. at 577–78.

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U.S. 381 (1940), dealt with the reverse of the schemes in *Currin* and *Rock Royal*. There, private parties were permitted to propose coal prices pursuant to statutory standards, but the proposals could be "approved, disapproved, or modified" by the relevant government agency. *Id.* at 388. Because that meant that the Government "determine[d] the prices ... [a]nd ... ha[d] authority and surveillance over" private parties, industry members "function[ed] subordinately" to the Government, and Congress had not "delegated its legislative authority to the[m]." *Id.* at 399.

B. Granting Private Parties The Power To Effectively Wield Rulemaking Authority Is Impermissible And Anticompetitive.

1. Although this Court has approved several different approaches to private involvement in governmental rulemaking, all of the permutations described above have one critical factor in common: the Government retains ultimate authority over the rules' contents, either by crafting them in the first place or by deciding whether and what to adopt. Take that away, and a private party could wind up with the practical ability to both start (by writing) and finish (by approving or disapproving) the rulemaking process. Because private actors cannot constitutionally be empowered to wield the sovereign's rulemaking authority over an industry, that is a step too far.

This principle was spelled out in *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936). The Bituminous Coal Conservation Act of 1935 was Congress's initial effort to stabilize the coal industry, but it "delegate[d] the

power to fix maximum hours of labor [and] minimum wages" to a subsection of that industry. *Id.* at 310. This was "legislative delegation in its most obnoxious form" because it was "to private persons" and "not even ... an official or an official body." *Id.* at 311; see also *Currin*, 306 U.S. at 15 (Congress cannot "attempt[] to abdicate, or to transfer to others, the essential legislative functions with which it is vested by the Constitution."). Applying these principles, the courts of appeal have recognized that while the Government may "employ private entities for *ministerial* or *advisory* roles," Congress may not "give these entities governmental power over others." *Pittston Co.* v. *United States*, 368 F.3d 385, 395 (4th Cir. 2004); see also, *e.g.*, *United States* v. *Frame*, 885 F.2d 1119, 1129 (3d Cir. 1989) (same); *Sierra Club* v. *Sigler*, 695 F.2d 957, 963 n.3 (5th Cir. 1983) ("an agency may not delegate its public duties to private entities").

2. While delegating legislative power to private parties can be condemned as subverting the political process, *Misretta* v. *United States*, 488 U.S. 361, 422 (1989) (Scalia, J., dissenting); see also *Yakus* v. *United States*, 321 U.S. 414, 424 (1944), it can also subvert competition. Quite obviously, allowing one set of private parties to adopt regulatory standards, backed by the force of law, that govern other private parties creates a risk that the standards developed will benefit the former to the detriment of the latter. See, *e.g.*, Louis L. Jaffe, *Law Making By Private Groups*, 51 Harv. L. Rev. 201, 202 (1937) (discussing such "demand[s] by the more explicit elements in a group that the group as a corporate body be given power to coerce under the sanction of law dissentient members of the group"). There is a reason why an umpire, and not the opposing team, calls balls and strikes.

Indeed, this Court has emphasized the problems that private-party delegation poses to competition. In *Carter*, the Court expressly recognized the anticompetitive risks. It explained that private party delegation can leave the "dissentient minority [subjected] to the will of the stated majority," but that "one person may not be entrusted with the power to regulate the business of another, and especially of a competitor." 298 U.S. at 311. Even where approving delegation in *Currin*, the Court emphasized that it was *not* "a case where a group of producers may make the law and force it upon a minority." 306 U.S. at 15; see also Br. for the U.S., 1938 WL 63974, at *75 ("In this case the growers cannot impose their will on anyone.").

C. Delegation Of Rulemaking Power To Government-Created Corporations That Are Injected Into The Commercial Sphere Likewise Warrants Scrutiny.

These principles are no less powerful when the regulating private entity is a government-formed corporation that has been injected into the commercial sphere. There is a "long history of corporations created and participated in by the United States for the achievement of governmental objectives." *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 386 (1995). In the 1960s, Congress started forming "corporations that it specifically designated *not* to be agencies or establishments of the United States Government, and declined to subject to [statutory] control mechanisms." *Id.* at 390. In that way, the Government could "act unhindered by the restraints of bureaucracy and politics." *Id.* at 391; see also Kevin Kosar, Cong. Research Serv., Report No. RL30365, *Federal Government Corporations: An Overview* (2011).

Having chosen this corporate form in order to shed certain governmental burdens, Congress also intends

for these firms to "enter[] the private sector, but [to] do[] so with Government-conferred advantages." *Lebron*, 513 U.S. at 390. Such benefits can give government corporations a boost unavailable to private parties that do not get their start in an act of Congress.

But these advantages should not include vesting such entities with sovereign legislative powers to make rules to govern other private actors. Like the other private parties in the marketplace, these government-created corporations frequently engage in the "commercial sale of goods and services," *id.* at 388, and may even compete with private entities for customers or resources. Absent a level of control that does not exist here, there is no reason why a "for-profit" government corporation should be granted legislative power that other private parties cannot wield. Indeed, this Court has even recognized that there is a risk of self-dealing when the Government *qua* Government engages in commercial transactions while also acting as the regulator over such transactions. See, *e.g.*, *United States* v. *Winstar Corp.*, 518 U.S. 839, 897–98 (1996) (plurality opinion).

In short, when Congress creates corporations with the purpose of having those corporations enter the private sector and engage in commercial activities without the level of control that exists for federal agencies, they should be treated like private parties for the purpose of determining whether they have been delegated sovereign rulemaking power in violation of the non-delegation doctrine.

II. SECTION 207 IS AN IMPERMISSIBLE DELEGATION OF RULEMAKING POWER THAT HAS PRACTICAL IMPLICATIONS FOR THE CHAMBER'S MEMBERS.

Section 207 delegates too much rulemaking power to Amtrak, and does so in a way that raises significant concerns for the nation's businesses that depend on freight-rail services.

A. Section 207 Impermissibly Delegates Effective Rulemaking Power To Amtrak.

Section 207(a) directs Amtrak and the FRA to "jointly ... develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations," "in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate." 49 U.S.C. § 24101 (PIIRA § 207(a)). In the event no agreement is reached, either Amtrak or the FRA (or any other party involved in the standards' development) may petition the Surface Transportation Board (STB) to appoint an arbitrator to resolve the matter through binding arbitration. *Id.* (PIIRA § 207(d)). Amtrak and rail carriers must incorporate the relevant standards into contracts "[t]o the extent practicable." *Id.* (PIIRA § 207(c)). And the STB is empowered to investigate violations of these standards and award damages against host railroads that fail to provide Amtrak with sufficient access to their rail lines. *Id.* § 24308(f) (PIIRA § 213(a)).

This constitutes too broad a delegation of lawmaking authority. As Respondent Association of Ameri-

can Railroads (AAR) explains, the command to "jointly" develop standards leaves Amtrak and the FRA as equals, which means that the Government does not retain exclusive control over the contents of the standards. AAR Br. 18–19. It is, moreover, no answer to say that this Court has previously upheld schemes in which private parties could either disapprove or propose standards, Br. for U.S. 19–26, because allowing Amtrak to do both at the same time means forfeiting the features that ensured Government control over the rule's contents—*i.e.*, writing the rules (in *Currin* and *Rock Royal*) or being able to modify or nullify them (in *Sunshine Anthracite*). AAR Br. 19–23. The Government does not get the last word under section 207(a).

Nor does the arbitration provision in section 207(d) save this scheme. Nothing in the statute says who the STB-appointed arbitrator must be (Government or not), or that the arbitrator must put a thumb on the scale in favor of the Government's interests over Amtrak's. AAR Br. 26–30. Not only that, but the provision also "pollute[s] the rulemaking process over and above the other defects besetting the statute" because it "stack[s] the deck in favor of compromise." Pet. App. 15a. Even if the FRA prefers a different position, the risk that the arbitrator could side with Amtrak incentivizes the FRA to reach a compromise, rather than simply imposing the position that it, as the government agency, thinks is best.

Section 207 thus implicates one of the core concerns discussed above that undergirds the non-delegation doctrine: it provides a mechanism for Amtrak to advantage its business interests over other commercial parties by giving Amtrak the ability to shape key regulatory standards. See AAR Br. 5–10, 18–19, 23–24. Congress has given Amtrak direct control over

binding regulatory standards, and the Government exercises no control over Amtrak's "'day-to-day operations.'" *Id.* at 14, 40–41.

Because of its status as a "for-profit" commercial enterprise, 49 U.S.C. § 24301(a)(2), Amtrak has strong incentives to use its rulemaking authority to advantage its operations. Amtrak "compete[s] with the freight railroads ... for use of their scarce track," Pet. App. 19a, and, accordingly, Amtrak has good reason to insist upon standards that require that its trains be given greater rail access than freight trains. Indeed, according to AAR, Amtrak already used its rulemaking authority to obtain standards that favor its passenger traffic at the expense of freight traffic. AAR Br. 8–10.

B. Upholding Section 207 Risks Serious Repercussions For Freight Shippers And The Economy.

Track space is a scarce resource. And, as noted, Amtrak competes with freight railroads for access to that track. How this balance is struck has broad consequences to the Chamber's members and the nation's economy.

Freight railroads ship an enormous and increasing amount of goods. There were over 2 billion tons of shipments in 2012, and the Department of Transportation estimates that the figure will climb to nearly 2.8 billion tons by 2040. U.S. Dep't of Transp., Bureau of Transp. Statistics, *Freight Facts and Figures 2013*, at 3 tbl.2-1 (Jan. 2014). Measured in dollars, $551 billion worth of goods are shipped by freight rail today, and that number is projected to grow to almost $900 billion within 30 years. *Id.* at 4 tbl.2-2. The Chamber's members routinely use rail for shipping

their goods and are amongst the nation's largest freight rail shippers.

This level of commercial activity has far-reaching significance for the national economy. It should come as no surprise that, for example, "America's freight railroads sustain 1.2 million jobs, including 180,000 high-paying jobs in the freight rail industry itself." *Perspectives from Users of the Nation's Freight System: Hearing Before the Panel on 21st-Century Freight Transp. of the H. Comm. on Transp. And Infrastructure*, 113th Cong. 68 (2013) (statement of Edward R. Hamberger, President and CEO, Ass'n of Am. R.R.). Railroads help move roughly one-third of all U.S. exports. *Id.* at 72. And by providing efficient transportation services, freight rail is an essential part of our nation's (and the world's) economy, has ultimately lowering costs for consumers worldwide. See, *e.g.*, Ass'n of Am. R.R., *The Economic Impact of America's Freight Railroads* (May 2014).

The consequence of delegating rulemaking authority to Amtrak, however, is that neither the FRA nor the STB ultimately has final say as to important rail regulatory standards that can slow down the shipment of goods by rail, or make shipments more expensive, or both. Amtrak's ability to tilt those standards in its favor threatens to harm not only the Chamber's members, but consumers as well. Enforcing non-delegation principles, by contrast, would ensure that freight rail service will be subjected to evenhanded rules that will serve to benefit the country as a whole, not just the interests of a single commercial entity.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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AMICUS CURIAE BRIEF

No. 13-1080

In the Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, et al.,
Petitioners,

v.

ASSOCIATION OF AMERICAN RAILROADS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICI CURIAE ENVIRONMENTAL LAW AND POLICY CENTER, NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, ALL ABOARD OHIO, AND VIRGINIANS FOR HIGH SPEED RAIL IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Section 207(a) of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, Div. B, 122 Stat. 4916, requires that the Federal Railroad Administration (FRA) and Amtrak "jointly . . . develop" the metrics and standards for Amtrak's performance that will be used in part to determine whether the Surface Transportation Board (STB) will investigate a freight railroad for failing to provide the preference for Amtrak's passenger trains that is required by 49 U.S.C. § 24308(c)(Supp. V 2011). In the event that the FRA and Amtrak cannot agree on the metrics and standards within 180 days, Section 207(d) of the Act provides for the STB to "appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." 122 Stat. 4917.

The question presented is whether Section 207 effects an unconstitutional delegation of legislative power to a private entity.

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INTEREST OF *AMICI*[1]

Amici are four not-for-profit organizations that share the common goal of advancing the development and operation of intercity passenger rail service in the United States. All five organizations have members who regularly ride Amtrak trains and are impacted by the on-time performance of those trains.

The Environmental Law and Policy Center of the Midwest ("ELPC") is a not-for-profit public interest environmental legal advocacy organization. Founded in 1993, ELPC develops and leads successful strategic advocacy campaigns to improve environmental quality and protect our natural resources through the advancement of clean air, clean transportation and clean energy policies at the regional and national levels. ELPC has worked to advance intercity passenger rail in the Midwest and nationwide for almost twenty years.

The National Association of Railroad Passengers ("NARP") is the largest national membership advocacy organization for train and rail transit passengers consisting of 28,000 individual members nationwide. Since its founding in 1967, NARP has worked to expand the quality and quantity of passenger rail in the United States. NARP's mission is to work for a

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[1] *Amici* affirm that Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and in accordance with Rule 37.3(a), that no person other than *amici* or their counsel contributed any money to fund its preparation or submission. Counsel of record for all parties graciously consented in writing to the filing of this *amici* brief, and copies of their letters of consent are on file with the Clerk's office.

modern, customer-focused national passenger train network that provides a travel choice Americans want.

The Ohio Association of Railroad Passengers (dba "All Aboard Ohio") is comprised of citizens, businesses and organizations that advocate for more and better transportation choices in Ohio, including more passenger trains, better public transit and improved rail infrastructure. All Aboard Ohio exists to achieve a modern, consumer-focused, state-wide passenger rail system.

Virginians for High Speed Rail ("VHSR") is a not-for-profit coalition of citizens, localities, economic development agencies, community organizations, and businesses that educate and advocate for the expansion of fast, frequent, and reliable rail service. Founded in 1994, VHSR promotes passenger rail as an energy efficient, cleaner mode of transportation that provides significant economic benefits.

ELPC, NARP, All Aboard Ohio and VHSR seek to present the collective views of their supporters in this brief since the determination of the constitutionality of Section 207 of PRIIA will have a direct effect on the viability of intercity passenger rail in the United States. Accordingly, amici submit that, for the reasons set forth in this brief and the brief of the petitioner, the decision of the court of appeals should be reversed.

SUMMARY OF ARGUMENT

1. As Amtrak celebrated its 40th anniversary in 2011, Americans were riding Amtrak passenger trains in record numbers. Ridership had increased from 16 million in 1972 to 31 million passengers in 2012. For most of the past decade, ridership records have been

shattered year over year despite the fact that Amtrak service is extremely limited, typically running only two trains a day on most long distance routes.

2. The court of appeals in this matter reversed the ruling of the district court, and held that metrics and standards under Section 207 of the Passenger Rail Investment and Improvement Act (PRIIA), 49 U.S.C. § 24308(c)(Supp. V 2001), constitutes an unlawful delegation of regulatory power to a private party. The court of appeals based its decision on two separate grounds: (1) an erroneous finding that Amtrak is a private entity and (2) a complete disregard of the factors indicating sufficient governmental control over the development and implementation of the metrics and standards.

First, the court of appeals decision invalidating Section 207 runs afoul of the plain text reading of the relevant statutes, the extensive and informative legislative history and applicable case law, all of which demonstrate that Amtrak is not a private entity for purposes of the non-delegation doctrine.

In 1970, Congress created Amtrak to advance the national goal of providing intercity passenger rail service in the United States as a for-profit entity under Rail Passenger Service Act of 1970 (RPSA), Pub. L. No. 91-518, 84 Stat. 1327. However, Congress subsequently amended RPSA in 1978 to provide that Amtrak shall be "operated and managed" as a for-profit entity. The legislative history clearly acknowledges that while Amtrak should be "operated and managed" as a for-profit entity, it is not, in fact, a private for-profit corporation.

Further, in *Lebron v. National Railroad Passenger Corp.*, this Court held that Amtrak "is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution. *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 394 (1995).

Second, the authority Congress granted to Amtrak is extremely limited and the government retains sufficient control over the exercise of this authority. Amtrak must act "jointly with" FRA to develop the metrics and standards that quantify Amtrak's performance and service. While the metrics and standards can serve as a basis for the initiation of an investigation by the Surface Transportation Board as to whether the freight railroads failed to grant preference to passenger trains, no penalty or damages can be ascribed to any party for Amtrak's failure to meet the metrics and standards.

Accordingly, the statutory scheme in PRIIA is similar to other statutory frameworks this Court has sustained against delegation challengers. *See e.g. Currin v. Wallace*, 306 U.S. 1 (1939). Assuming, *arguendo* that Amtrak is considered to be a private entity, Section 207 of PRIIA is still a valid constitutional delegation because the government retains sufficient control over the exercise of this authority. It has been 80 years since this Court invalidated an Act of Congress on the ground that it delegated too much authority to a private party. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). Unlike *Carter Coal*, here a federal agency, FRA, was involved in the promulgation of the metrics and standards. Further stakeholders, including the freight railroads, were

consulted prior to publication in the Federal Register, and also submitted public comments after notice in the Federal Register.

3. As a matter of public policy, the decision by the court of appeals, which invalidates Amtrak's on-time performance measures, thwarts the intent of Congress and threatens the future of passenger rail service in the United States.

In 2008, Congress enacted PRIIA, in part, because it recognized that on-time performance was critical to the success of achieving viable national intercity passenger rail service in the United States. Prior to the passage of PRIIA, Amtrak's on-time performance for long-distance trains was below 40%. Following the passage of PRIIA, Amtrak's on-time performance increased dramatically. Section 207(a) of PRIIA required the development of metrics and standards. The metrics and standards that were finalized in May 2010 required that Amtrak achieve on-time performance of 80% to 95%. Just two years later, in 2012, Amtrak achieved its highest ever on-time performance level of 88.7% system-wide, and 81.2% for long distance.

Shortly after the 2013 court of appeals decision in this matter, however, Amtrak's on-time performance levels dropped significantly. As of June 2014, the system-wide rate had fallen to 69.7%, and the and long-distance rate had fallen to 41.2%, half of what it had been just 29 months earlier. Due in large part to poor on-time performance, Amtrak's ridership and ticket revenues have fallen by 15% over the past year to date.

Congress' enactment of Section 207 of PRIIA had the intended effect of increasing the level of service and performance of Amtrak. If affirmed, the decision by the court of appeals will likely result in further intercity passenger train delays and plummeting revenues. This dynamic not only thwarts the intent of Congress to build a balanced national transportation system, but also, as a practical matter, threatens the future of intercity passenger rail service in the United States.

For all of the foregoing reasons, the judgment of the court of appeals should be reversed.

ARGUMENT

I. Congress's Delegation of Authority under Section 207 of PRIIA Is Constitutional

This case concerns the constitutionality of the Congressional delegation of authority to the FRA and Amtrak to "jointly develop" metrics and standards for Amtrak's performance under Section 207(a) PRIIA. No one questions the delegation of authority to the FRA; the sole issue before the Court is whether Congress improperly delegated responsibility to Amtrak as a "private entity." There are two principal reasons why Congress' delegation of authority under Section 207 of PRIIA does not violate the nondelegation doctrine under the United States' Constitution.[2] First, the statutory text and legislative history of the relevant statutes leave no doubt that Amtrak is a governmental

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[2] Article I Section 1 of the Constitution which provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States." U.S. CONST. art. I, §1

entity. Second, the government has retained sufficient control over the exercise of its authority to avert any constitutional nondelegation concerns.

A. Amtrak Is Not a Private Entity for Purposes of Determining Whether the Delegation of Authority under Section 207 of PRIIA Is Constitutional

1. Congress Created Amtrak to Ensure That There Would Be Intercity Passenger Rail Service in the United States

Prior to Amtrak's creation, the American rail sector was in steep decline. From approximately 1950 to 1970, the private railroads, which operated both passenger and freight services, faced mounting financial problems. Intercity passenger rail service had to compete with explosive growth in the highway and airline industries, and freight rail suffered from high fixed operating costs, which were difficult to offset in the face of stiffer competition for the trucking industry.[3] Although the rail industry sought to discontinue the cost-prohibitive passenger rail business on certain lines, as "common carriers" they were required to provide passenger service as well as freight service, and thus were prohibited from ceasing service until the Interstate Commerce Commission (ICC) and state regulatory commissions issued an order allowing the cessation of passenger service. *National R.R.*

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[3] ELIZABETH PINKSTON, CONG. BUDGET OFFICE, THE PAST AND FUTURE OF U.S. PASSENGER RAIL SERVICE, 5 (2003).

Passenger Corp.v. Atchinson, Topeka & Santa Fe Ry., 470 U.S. 451, 454(1985).

In 1968, the ICC issued a warning to Congress and the President that "[w]ithout immediate action on the part of the Federal Government, significant segments of the country will soon face the loss of their last remaining rail [passenger] service." [4]

In 1970, Congress created Amtrak "to avert the threatened extinction of passenger train in the United States."[5] See, Rail Passenger Service Act of 1970 (RPSA) Pub. L. No. 91-518, § 101, 84 Stat. 1328 (creating the National Railroad Passenger Corporation, now known as Amtrak). RPSA expressly states that Congress considers passenger rail service to be a "public convenience and necessity" and "that federal financial assistance as well as investment from the private sector of the economy" was needed to achieve the national goal of continuing and improving passenger rail service in the United States. RPSA, Pub. L. No. 91-518, § 101, 84 Stat. 1328.

As a condition of relieving railroads of their intercity passenger rail service obligations, Congress required, among other things, that the private railroads allow Amtrak to operate passenger trains on their tracks and facilities at rates either agreed to by Amtrak and the host railroads or prescribed by the

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[4] *Interstate Commerce Commission's Report to the President and the Congress Effectiveness of the Act*, March 15, 1978, p.2, http://www.fra.dot.gov/eLib/Details/L04184.

[5] *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 383 (1995).

ICC, and later the Surface Transportation Board (STB). See 49 U.S.C. § 24308(a); *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 410 (1992); *Atchinson, Topeka & Santa Fe Ry.*, 470 U.S. at 455.[6]

In 1973, Congress investigated concerns that some of the railroads were continually impeding the movement of Amtrak trains and instituting slow orders. Senator Vance Hartke, Chairman of the Surface Transportation Subcommittee stated that: "[I]n Indiana, the James Whitcomb Riley is forced to run at speeds of 10 miles per hour because of slow orders on bad track between Indianapolis and Chicago. Running a passenger train over track like that is a public disservice." *Amtrak Oversight and Authorization: Hearing on S. 1763:Before the Surface Transportation Subcomm. of the S. Comm. on Commerce*, 93rd Cong. 88 (1973)(statement of Senator Vance Hartke). Accordingly, Congress granted Amtrak a "general preference" over freight transportation in using rail facilities, specifying that Amtrak has "preference over freight transportation in using a rail line, junction or crossing, subject to the objection of a rail carrier, and the [STB] orders otherwise under this subsection after section 553 of Title 5 hearing." 49 U.S.C. § 2308(c). See also Amtrak Improvement Act of 1973, Pub. L. No. 93-

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[6] Today, except for routes along the Northeast Corridor (Washington D.C. to Boston) Amtrak trains continue to operate almost entirely on tracks owned and dispatched by the freight railroads.

146, §10(2), 87 Stat. 552 (initial version).[7] While the STB is administratively affiliated with the DOT, its decisions cannot be reviewed by the Secretary of Transportation or any other DOT official. See 49 U.S.C. § 703(c).

Again and again over the last 40 years, Congress has emphasized that passenger rail, in addition to freight rail, is a critical component to maintaining a balanced transportation system in United States.[8] Congress has consistently emphasized that "[i]ntercity passenger rail is an increasingly necessary transportation alternative to highway and air travel, particularly in congested parts of the country....

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[7] This, in spite of the fact that AAR's President, Stephen Ailes testified before Congress that "it is the policy of all participating [rail]roads to give preference to Amtrak passenger trains, even at the cost of delay to freight service." *Amtrak Oversight and Authorization: Hearing on S. 1763 Before the Surface Transportation Subcomm. of the S. Comm. on Commerce*, 93rd Cong. 134 (1973)(statement of Stephen Ailes, President, American Railroad Administration).

[8] See, e.g., Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 548; Amtrak Improvement Act of 1974, Pub. L. No. 93-496,88 Stat. 1526; Amtrak Improvement Act of 1975, Pub. L. No. 94-25, 89 Stat. 90; Amtrak Improvement Act of 1976, Pub. L. No. 94-555,Tit. I, 90 Stat. 2613; Amtrak Improvement Act of 1978, Pub. L. No. 95-421, 92 Stat. 923; Amtrak Reorganization Act of 1979, Pub. L. No. 96-73, Tit. I, 93 Stat. 537; Amtrak Improvement Act of 1981, Pub. L. No. 97-35, Tit. XI, Subtit. F, 95 Stat. 687; Amtrak Reauthorization Act of 1985, Pub. L. No. 99-272, Tit. IV, Subtit. A, 100 Stat. 106; Amtrak Reauthorization and Improvement Act of 1990, Pub. L. No 101-322, 104 Stat. 295; Amtrak Authorization and Development Act, Pub. L. No. 102-533, 106 Stat. 3515 (1992); Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, 111 Stat. 2570 (1997).

Further it is critical to decrease our dependence on foreign oil and alleviate the impacts of global climate change." H.R. Rep. No. 690, 110th Cong., 2d Sess. 32 (2008). To date, Congress has invested more than $40 billion to support Amtrak operations and infrastructure.

At the same time, Congress has acknowledged that, without federal involvement and oversight, it was unlikely that Amtrak would be self-sufficient, profitable, and thus able to meet the country's needs for intercity passenger rail. Congress noted that "Amtrak's service is unique in comparison to the Federal approach of financing the nation's other major passenger transportation modes. The nation's highway, public transportation, and aviation systems all receive robust Federal investment, significantly financed by user fees. While this expectation helped justify efforts of significantly restricting or eliminating Federal investment for intercity passenger rail, it has also undermined efforts to develop a national intercity passenger rail system that is capable of meeting the needs of the nation in the 21st century" *Id.* at 33.

In 2008, Congress passed the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Pub. L. No. 110-432, Div. B, 122 Stat. 4907, to give Amtrak the tools to address this problem. PRIIA required FRA and Amtrak to "jointly in consultation with the Surface Transportation Board, rail carriers, States, and other stakeholders, where appropriate," to "develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations." 49 U.S.C. § 24101 note (PRIIA § 207(a)).

Amtrak uses these metrics and standards for various purposes, including annual evaluations of its performance, reports to Congress, the development of performance improvement plans for long-distance routes, and the development and implementation of a plan to improve on board service. 49 U.S.C. § 24710(a)-(b); 49 U.S.C. § 24101 note (PRIIA § 222). PRIIA is significant because for the first time Congress legislated requirements that quantify the performance and service quality of intercity passenger rail in the United States.

In addition, under PRIIA, Congress gave the STB enforcement authority for the general preference rule in the Amtrak Improvement Act of 1973. PRIIA authorizes the STB to adjudicate[e] disputes between Amtrak and the freight railroads, including disputes about when Amtrak's "on-time performance problems" stem from the freight railroads' failure to "provide preference to Amtrak over freight trains." S. Rep. No. 67, 110th Cong., 1st Sess. 25-26 (2007)(*2007 Senate Report*). The STB may initiate an investigation if on-time performance averages less than 80 percent for two consecutive calendar quarters, 49 U.S.C. § 24308(f)(1), or "upon the filing of a complaint by Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service." *Ibid.*

As required under Section 207(a) of PRIIA, FRA and Amtrak jointly developed a draft version of the metrics and standards (J.A. 11-75) and FRA published a notice in the Federal Register seeking public comment (J.A. 75-77). Upon consideration of the written comments, including those submitted by the freight railroads, final

metrics and standards were issued in May 2010 (J.A. 77-156). Most notably, the metrics and standards require Amtrak to achieve a minimum on-time performance rate of 80% to 95% of the time for each route, depending on the route and year. (J.A. 133).

PRIIA's metrics and standards are binding only on Amtrak, not the freight railroads. Moreover, the operating agreements between Amtrak and the railroads are not supplanted by the metrics and standards. Although Section 207(c) provides for the incorporation of the metrics and standards into the operating agreement between Amtrak and the railroads, it is only "[t]o the *extent practicable*," 49 U.S.C. § 24101 note (emphasis added), and there is no penalty for failing to do so. Further, while the metrics and standards may serve as a trigger for initiating an STB investigation, they do not serve as a basis to impose any kind of sanctions against the freight railroads. STB may seek "damages and other relief" only if the STB finds that a host railroad failed to provide the mandated preference for intercity passenger rail trains after a review of all relevant evidence from all parties, 49 U.S.C. § 24308(f)(1), and further finds that the delays or failures "are attributable to the rail carriers' failure to provide preference to Amtrak over freight transportation." 49 U.S.C. § 24308(f)(2). Any potential for harm to the freight railroads in terms of assessing damages, emanates only from Congress' directive in the 1973 reauthorization of RPSA requiring passenger rail preference over freight, not from PRIIA's metrics and standards.

2. The Statutory Text and Legislative History of Relevant Statutes Support the Conclusion That Amtrak Is a Public Entity for Purposes of Nondelegation Analysis

The relevant statutory language and the legislative history clearly show that Amtrak is not a for-profit corporation. "The starting point in every case involving construction of a statute is the language itself." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976); *TVA v. Hill*, 437 U.S. 153, 173 (1978). Moreover, in interpreting a statute, the Court will consider its place in a broader statutory scheme, rather than viewing statutory language in isolation. *Zuni Public School District No. 89 v. Department of Educ.*, 127 S. Ct. 1534, 1541(2007); *Reno v. Koray*, 515 U.S. 50, 56 (1995).

In 1970, when Congress created Amtrak under RPSA, Congress declared that Amtrak is "not a department, agency, or instrumentality of the United States Government." 49 U.S.C. § 24301(a)(3). "As initially conceived, Amtrak was to be a for-profit corporation." *Lebron*, 513 U.S. at 384-385. Section 301 stated that "[t]he Corporation shall be a for profit corporation" the purpose of which is to provide intercity passenger rail service to meet the Nation's intercity passenger transportation requirements. Rail Passenger Service Act of 1970, Pub. L. No. 91-518, §301, 84 Stat. 1328, 1330. While the law can be characterized as unusual, the legislative history shows, that Congress used this language to encourage Amtrak to limit taxpayer funding necessary to operate intercity passenger rail in the United States. A. Daniel O'Neal, majority counsel for the Senate Transportation

Subcommittee recalled that during the drafting of RPSA, "We added the for-profit clause because we thought this new entity should have high aspirations. It would be wonderful if such service could be self-sustaining, but nowhere in the world has any nation been able to avoid subsidizing rail passengers."[9]

By 1978, Congress recognized that Amtrak, due to a badly deteriorating passenger equipment fleet and a generally declining level of track maintenance by the railroads, would never be a for-profit corporation. "Problems with the thesis arose in the very beginning, when the Secretary of Transportation published a report which provided for a passenger train network that was merely a "cut and paste" of the pre-existing railroad-operated system in that the basic system merely entailed a series of discontinuance from the old pattern of service." H.R. Rep. No. 1182 at 6-7, 95th Cong., 2d Sess. (1978).

Accordingly, during the 1978 reauthorization of RPSA, Congress modified the "for profit corporation" status of Amtrak. "The second sentence of section 301 of the Rail Passenger Service Act (45 U.S.C. § 541) is amended by inserting "operated and managed as" immediately before "a for profit corporation." Amtrak Improvement Act of 1978, Pub. L. No. 95-421, §11, 92 Stat. 923, 928. In referencing the revision of Section 301, the committee of jurisdiction explained that:

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[9] RANDALL PETERMAN, CONG. RESEARCH SERVICE., RL31473, AMTRAK PROFITABILITY: AN ANALYSIS OF CONGRESSIONAL EXPECTATIONS AT AMTRAK'S CREATION CRS-4 (2002).

> "Section 9 amends section 301 of the RPSA is to conform the law to reality, providing that Amtrak shall be "operated and managed as" a for-profit corporation. **This amendment recognizes that Amtrak is not a for-profit corporation."** H.R. Rep. No. 1182, 95th Cong., 2d Sess. 15 (1978)*(emphasis added).*[10]

Since then Congress has revised Amtrak's "mission" that is "to provide efficient and effective intercity passenger rail mobility" while using good business judgment to "minimize Government subsidies." 49 U.S.C. § 24101(b) and (d).

Even the Respondent has previously recognized that Amtrak is not a private entity. "[F]or all practical purposes the intercity rail passenger business has been nationalized now. When you look at the size of government payments that you are talking about here, that have to made to ... sustain it. And you look at –you know—the distance down the road before there is any possibility of Amtrak's operation becoming a profitable one, so that the stock gets to be worth something, if it's not nationalization now, it's pretty hard to distinguish it from nationalization." *Amtrak Oversight and Authorization: Hearing on S. 1763 Before the Surface Transportation Subcomm. of the S. Comm. on Commerce*, 93rd Cong. 130 (1973)(Testimony

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[10] "Amtrak is not now a for-profit company; it was originally created as such, but that status was changed by the Amtrak Improvement Act of 1978 (P.L. 95-1478)," D. RANDALL PETERMAN, CONG. RESEARCH SERVICE., RL31473, AMTRAK PROFITABILITY: AN ANALYSIS OF CONGRESSIONAL EXPECTATIONS AT AMTRAK'S CREATION (2002) at CRS-1.

of Stephen Ailes, President, the American Association of Railroads).

The relevant statutory language as well as the legislative history defines an entity imbued with a public purpose and mission subject to extensive congressional oversight and administrative control that is more akin to a governmental agency than a private for-profit corporation. In addition, consideration of numerous other facts support the conclusion that Amtrak is not a private entity for constitutional nondelegation purposes.

In *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), this Court considered whether Amtrak should, despite its "nominal [ ]" status as "a private corporation," be regarded as a Government entity for First Amendment purposes." 513 U.S. at 383. The Court held that Amtrak "is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." *Id.* at 394. As this Court explained, Congress's characterization of Amtrak is "assuredly dispositive of Amtrak's status as a Government [or non-Government] entity for purposes of matters that are within Congress's control- for example, whether it is subject to statutes." *Id.* at 392.

Consistent with Amtrak's unique government status, Congress has specified that Amtrak is subject to federal operating subsidies and specific federal grant programs, 49 U.S.C. §§ 24104 and 24105, and to the Federal Freedom of Information Act to provide a public accounting of its expenditures. *See, e.g.* 49 U.S.C. § 24301(e), notes that "Section 552 of Title 5, United State Code [the Freedom of Information Act ("FOIA")],

applies to Amtrak for any fiscal year in which Amtrak receives a Federal subsidy and Amtrak has an Inspector General pursuant to the Inspector General Act of 1978, 5 U.S.C. App. § 2.[11] Amtrak is also under a statutory mandate to provide an annual report to Congress on its activities, and subject itself to audits, 49 U.S.C. § 24315, and the Department of Transportation also has to approve Amtrak's budget. All of these statutory requirements are indicative of Amtrak's status as a governmental entity.

Admittedly, Congress has omitted Amtrak from certain other statutes such as the Government Corporation Control Act, 31 U.S.C. § 9101 et seq. *See* Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, Tit. IV, § 415(d) (2), 111 Stat. 2590; Title 31 of the United State Code, setting forth the money and finance obligations of the United States government, See 49 U.S.C. § 24301(a)(3) and the Unfunded Mandate Reform Act of 1995, 2 U.S.C. § 1501 et seq. However, on the whole, Congress has subjected Amtrak to more "public" statutory obligations than "private" entity statutory exemptions.

Moreover, as noted in *Lebron*, Amtrak's governance structure is in large part determined by Congress, and the Executive Branch offering further credence that Amtrak is more like a governmental entity than not. Unlike typical private corporations, the structure of Amtrak's Board of Directors is set forth in public law

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[11] Amtrak is defined as a "designated Federal entity" for purposes of the Inspector General Act—the same category that includes, *inter alia*, the EEOC, the FCC, the National Archives and Records Administration, the National Security Agency, and the SEC. See § 8G(a)(2), 5 U.S.C. App. § 2, at 521-522.

rather than corporate bylaws. The President appoints eight of the nine members of the board subject to the advice and consent of the Senate, including the Secretary of the Department of Transportation and a consumer representative, 49 U.S.C. § 24302(a)(1).

Consistent with Amtrak's public status, the U.S. Government Manual lists the National Railroad Passenger Corporation (AMTRAK) in the category entitled "Independent Establishments and Government Corporations" along with other organizations, including the Tennessee Valley Authority, Federal Deposit Insurance Corporation, Overseas Private Investment Corporation, and Pension Benefit Guaranty Corporation.[12] Consistent with Amtrak's true role as a public entity, Congress continues to take a hands-on approach in operating Amtrak, not only through appropriations, but also through oversight hearings and legislative action. Congress has, among other things, required Amtrak to allow passengers to carry firearms on trains. Consolidated Appropriations Act, 2010, Pub. L. 111-117, 123 Stat 3034, 3061, and prohibited Amtrak from discounting tickets by more than 50%. The Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. 112-55, 125 Stat 552, 660. Oversight hearings regularly review Amtrak's performance on particular routes and even question the price Amtrak charges for hamburgers. *Reviewing Alternatives to Amtrak's Annual Losses in Food and Beverage Service Before the Subcomm on Government Operations of the Committee on Oversight and Government Reform*, 113th Cong. 3 (2013).

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[12] U.S. Government Manual, p. 22 (2014).

Contrary to the court of appeals decision, the statutory language, legislative history, the Presidentially appointed board, and other indicia, show that is Amtrak is not a private entity for purposes of assessing the constitutionality of Congress delegation of authority under Article I.

B. The Government Retained Sufficient Control over the Excercise of Authority under Section 207 of PRIIA Thereby Avoiding Constitutional Nondelegation Concerns

The most recent case in which this Court invalidated an Act of Congress on the ground that it delegated too much authority to a private party was 80 years ago. In *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the Court struck down a statute that required all coal producers to accept the maximum labor hours and minimum wages negotiated by the producers of more than two-thirds of annual coal tonnage and representatives of more than half of the mine workers. *Id.* at 282-284, 310-312. In *Carter Coal*, the government had no involvement in the creation or approval of the binding labor provisions, which were instead divided and approved entirely by private entities and then deemed to be "accepted" by all code members in the relevant district or districts. *Id.* at 284.

Subsequently, this Court, in sustaining the validity of statutes permitting private parties to play a significant role in formulating or implementing new regulatory provisions, recognized that "[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and

practicality" in fashioning statutory schemes involving private parties. *Currin v. Wallace*, 306 U.S. 1, 15 (1939)(citation omitted); see also *Sunshine Anthracite Coal Co. v. Ad*, 310 U.S. 381 (1940); *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939).

Even assuming *arguendo* that Amtrak is considered to be a private entity, Section 207 of PRIIA is a valid constitutional delegation. Unlike *Carter Coal*, here, a federal agency, FRA, was involved in the promulgation of the metrics and standards; further, stakeholders including the freight railroads, were consulted prior to publication in the Federal Register and then submitted public comments after notice in the Federal Register. *See, e.g.* J.A. 77-156.

II. The Court of Appeals Decision, Which Invalidates Amtrak's On-time Performance Measures, Thwarts Congress' Intent and Threatens the Future of Passenger Rail in the United States

A. History of Intercity Passenger Rail in the United States

By the time Amtrak celebrated its 40th anniversary in 2011, Americans were riding Amtrak passenger trains in record numbers. Ridership increased from 16 million in 1972 to 31 million passengers in 2012. For most of the past decade, ridership records have been shattered year over year despite obstacles such as the fact that Amtrak service is extremely limited, typically running only two trains a day on most long distance routes. In addition, Amtrak operates on outdated equipment, which has been described as "obsolete stage coaches which should be permitted to die a horrible

death." *Amtrak Oversight and Authorization: Hearing on S. 1763 Before the Surface Transportation Subcomm. of the S. Comm. on Commerce*, 93rd Cong. 88 (1973)(statement of Anthony Haswell, Chairman, National Association of Railroad Passengers). Finally, unlike airplanes whose dispatching priorities are determined by federal air traffic controllers not the airlines, Amtrak passenger trains operate in large part on tracks owned and operated by freight railroads and are therefore subject to dispatching orders by freight rail employees.

Notwithstanding the foregoing, Amtrak posted a cumulative on-time performance rate of 83% in 2012, and for long distance trains, 71%.[13] The record indicates a strong correlation between increased ridership and on-time performance.

This success rate changed in 2013, when the court of appeals held that Section 207 "constitutes an unlawful delegation of regulatory power to a private entity," Pet. App. 3a, thereby invalidating Congress' directive to FRA and Amtrak to set and implement metrics and standards. Since 2013, Amtrak's on time performance has dropped by *half*, to approximately 42 percent.[14]

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[13] Amtrak, Annual Report for Fiscal Year 2012. http://www.amtrak.com/ccurl/103/360/Amtrak-Annual-Report-2012.pdf

[14] D.J. Stadtler, Vice President of Operation, Amtrak, *Testimony Before the Surface Transportation Board* (April 10, 2014), www.amtrak.com/ccurl/899/180/Amtrak-VP%20Operations-Stadtler-STBApr-09-2014.pdf

B. On Time Performance Is Critical to the Success of Intercity Passenger Rail Service in the United States

The successful movement of people, necessarily requires a reasonable degree of punctuality. In 2008, the Inspector General of the Department of Transportation reported that:

[P]oor OTP [on time performance] reduces ridership on Amtrak trains because potential passengers cannot predict when their train will arrive. It also increases costs, primarily by extending shifts, increasing staffing requirements, and utilizing more fuel. Improving OTP could significantly improve Amtrak's finances. It would generate funds Amtrak could use to increase the incentives to host railroads both to improve the performance of Amtrak trains operating on their tracks or [sic] reduce its reliance on Federal operating subsidies. Office of Inspector General, U.S. Dept. of Transportation, Report CR-2008-047, *Effects of Amtrak's Poor On-Time Performance, Federal Railroad Administration,* (March 28, 2008), p 2., https://www.oig.dot.gov/sites/default/files/effects_of_otp_report_FINAL.pdf.

Realizing the importance that on-time performance plays in the success of achieving a national intercity passenger rail program, Congress mandated the promulgation and implementation of metrics and standards to "give Amtrak an effective set of tools to ensure a high level of host railroad performance and included on-time performance specifically." *Id.* at 2.

Prior to the passage of PRIIA, Amtrak's on-time performance for long distance trains was below 40

percent.[15] In less than two years after the metrics and standards were finalized, Amtrak's achieved its highest level of on-time performance ever. In February 2012, its system-wide OTP level was 88.7% and on its long-distance routes, the OTP level was 81.2 % as compared to just 30% in 2006.[16]

C. A System of Performance Metrics and Standards Is Essential to Sustain Amtrak's On-time Performance

The 2013 court of appeals decision, which invalidated Amtrak's performance metrics, had an almost immediate negative impact on Amtrak's on-time performance. In its 2014 performance report, Amtrak found that host (freight) railroad delays accounted for roughly two-thirds of all of its delays.

Appearing before the STB, Amtrak's vice president of operations testified that: "[Amtrak] saw an immediate drop in on-time performance across the board that was directly attributable to train handling by the host carriers. . . . Freight train interference rates have nearly tripled, and this indicates not only that there are more delays, but that those delays are of longer duration. In response, ridership and ticket

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[15] D.J. Stadtler, Vice President of Operation, Amtrak, *Testimony Before the Surface Transportation Board* (April 10, 2014), www.amtrak.com/ccurl/899/180/Amtrak-VP%20Operations-Stadtler-STBApr-09-2014.pdf. (*Stadtler testimony*)

[16] See Amtrak, *Monthly Performance Report for February2012*, at E-7 (rev. Sept. 14, 2012), www.amtrak.com/ccurl/395/557/Amtrak-Monthly-Performance-Report-February-2012,0.pdf.

revenues have fallen by 15% year over year to date." *Stadtler Testimony* at 3, 5.

As of May 2014, only seven of Amtrak's 48 routes had a better on-time rate than in the prior year, before the ruling by the court of appeals. Eight of the 33 routes, including most of the long-distance cross-country lines, experienced on-time arrivals less than 50 percent over the past 12 months. The Empire Builder, running from Chicago to Washington, ran on time only 21 percent of the time in the past year. Only one in three California Zephyr trains made their trips between Chicago and San Francisco on time.[17]

By June 2014, the system-wide rate had fallen to 69.7%, and the rate for long-distance routes was only 41.2%, half of what it had been 29 months earlier. See Amtrak, Monthly Performance Report for June 2014, at E-7 (July 31, 2014), www.amtrak.com/ccurl/621/650/Amtrak-Monthly-Performance-Report-June2014.pdf.

As intercity trains are increasingly delayed, ridership and revenues will continue to plummet. This dynamic not only thwarts the intent of Congress to build a balanced national transportation system, but also, as a practical matter, threatens the future of intercity passenger rail in the United States.

CONCLUSION

The judgment of the court of appeals should be reversed.

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[17] http://www.washingtonpost.com/blogs/wonkblog/wp/2014/07/10/the-sorry-state-of-amtraks-on-time-performance-mapped/

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AUGUST 2014

AMICUS CURIAE BRIEF

No. 13-1080

IN THE

Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.

Petitioners,

v.

ASSOCIATION OF AMERICAN RAILROADS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESOLUTE FOREST PRODUCTS INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Section 207 of the Passenger Rail Investment and Improvement Act of 2008, which grants Amtrak the power to co-author regulations governing competitor railroads, is an unlawful delegation of governmental authority to a private actor.

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INTEREST OF THE *AMICUS CURIAE*[1]

Resolute Forest Products Inc. produces and markets a diverse range of products, including newsprint, specialty papers, market pulp, and wood products, with major facilities in the United States, Canada, and South Korea. Based on its experience marketing products in nearly 90 countries, Resolute is concerned that the delegation of rulemaking authority at issue in this case will serve as a model for, and vindicate, similar programs empowering private entities to regulate their competitors, to the detriment of the constitutional separation of powers, democratic accountability, and ultimately the rights of the governed. Having encountered similar arrangements and witnessed their faults and iniquities, Resolute agrees with this Court's observation in *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), that empowering a private entity to regulate the affairs of its unwilling competitors "is legislative delegation in its most obnoxious form" that inevitably leads to violation of the most basic guarantees of due process.

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[1]Pursuant to Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

Only twice before has the Court been confronted with an attempt to delegate federal policymaking authority to a private entity, and both times the Court has rejected it, with incredulity. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). It did so for good reason: "one person may not be intrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property." *Carter*, 298 U.S. at 311. Delegation of such power to private parties is antithetical to the vesting of governmental power in the branches of government and incompatible with the constitutional imperative of democratic accountability. Inevitably, such schemes to escape the confines of the vesting of the powers of government in the branches of government sacrifice the very rights that our system of government was designed to guarantee. Accordingly, as the Court has recognized, the nondelegation principle applies with special force to attempts to confer policymaking power on private entities.

Section 207 exemplifies all of the evils of delegation of policymaking authority to private actors. It authorizes Amtrak, a government-chartered for-profit corporation with private shareholders, to set the standards by which its own performance is

measured, allowing it to shift the blame for its failures to freight railroads, its competitors for the limited slots available on rail lines. Not only has Amtrak taken full advantage of this opportunity to pass the buck, but so has Congress, by foisting responsibility for Amtrak's poor performance, as well as some of the costs of remedying it, on third parties. This is the antithesis of the kind of public accountability that the constitutional separation of powers, as well as the vesting of governmental power in the branches of government, was designed to ensure. In this respect, Section 207 is entirely typical of attempts by Congress to delegate governmental power to private actors.

Equally typical is Amtrak's naked pursuit of self-interest in crafting metrics and standards that seriously disadvantage its competitors, as well as the concomitant violation of its competitors' due-process rights. Amtrak's bias in favor of its own interests is equal to that of any other economic actor, and that bias is plainly reflected in its policymaking here, including the one-sided standards it set and its attempt to rig future proceedings by limiting evidence of "permissible delays" that are not held against its competitors. This exercise confirms what the Court has previously suggested: that delegation of policymaking authority to private actors is one of the "situations...in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

The Court should reaffirm that delegation of governmental policymaking authority to private actors is repugnant to the Constitution and affirm the decision of the court below.

ARGUMENT

I. Strict Limits on Delegation to Private Actors Are Essential To Protect Individual Liberty Through Democratic Accountability

A. Delegation to Private Actors Undermines Democratic Accountability

"By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable." *Loving v. United States*, 517 U.S. 748, 757 (1996). In particular, "[t]he clear assignment of power to a branch...allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance." *Id.* at 758.

That kind of democratic accountability is frustrated, however, when private parties are charged with making those decisions. "[T]he basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government." *Tx. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 469 (Tx. 1997). Private entities, of course, are not elected by

the people or subject to appointment or control by an elected official. When a private actor exercises governmental authority in ways that are contrary to the public interest, the public can do no more than complain to lawmakers and other officials, who in turn can deflect the criticism back to the private actor. Yet the private actor is not accountable to the public through elections or otherwise. This is a recipe for unresponsive government.

Even more perniciously, the possibility of private delegation also warps the incentives of government officials. Legislators and executive officials, being sensitive to public opinion, may prefer to hand off controversial matters of policy to less-sensitive private actors. For example, a decision of whether or not to impose new pollution-control requirements is likely to prompt disapproval from whichever side loses—environmentalists and their supporters, on the one hand, and industry and its allies, on the other. But a politician or regulator can avoid such difficult decisions entirely by delegating them to private actors who aren't directly susceptible to such pressure.

Delegation similarly reduces the cost to elected officials of making unpopular choices. For example, by placing the pollution-control decision in the hands of environmentalists, a politician can effectively determine the outcome—more controls, at greater expense—without having to bear full responsibility for deciding. In this way, private delegation "calls into question the future operation of the political pro-

cess...." George W. Liebmann, Delegation to Private Parties in American Constitutional Law, 50 Ind. L.J. 650, 659 (1975).

Delegations that attempt to circumvent or circumscribe the role of the Executive pose special problems. The Framers "vest[ed] Executive authority in one person rather than several...in order to focus, rather than to spread, Executive responsibility thereby facilitating accountability." *Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in the judgment). But "[t]hat unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him," by delegating certain of his authorities and responsibilities to third parties. *Printz v. United States*, 521 U.S. 898, 923 (1997). Moreover, within the Executive Branch, accountability flows from the President by virtue of his power to remove executive officers. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146 (2010). But as with the double restriction on removal that the Court struck down in *Free Enterprise Fund*, the vesting of executive duties in private actors "grant[s]...executive power without the Executive's oversight" and thereby "subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts." *Id.* at 3155. This vesting of executive duties in private parties is "incompatible with the Constitution's separation of powers." *Id.*

These concerns are not hypothetical, having actually arisen in other contexts where Congress sought to pass the buck (sometimes literally) to third parties. For example, Congress has authorized citizen suits to challenge implementation delays under several environmental-protection statutes, including the Clean Air Act and Clean Water Act. 42 U.S.C. § 7604; 33 U.S.C. § 1365. And yet it is Congress that complains the loudest about regulatory burdens and collusion when environmental groups take advantage of these provisions to enforce the statutory deadlines for agency action set by Congress. *See, e.g.*, Hearing before the Subcom. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary regarding the Sunshine for Regulatory Decrees and Settlements Act of 2012, Feb. 3, 2012 (hearing on the "abuse" of consent decrees to hold agencies to statutory deadlines). Indeed, Members of this Court have recognized that outsourcing the setting of regulatory and enforcement priorities to private parties raises "[d]ifficult and fundamental questions" regarding delegation of the powers vested in the political branches. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring). *See also id.* at 209, 211 (Scalia, J., dissenting).

Relatedly, the Court in *Printz*, 521 U.S. at 920–35, rejected congressional "commandeering" of state officials to carry out federal policy on the basis that it would wreck the structure of accountability at all levels. "By forcing state governments to absorb the

financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." *Id.* at 930. State officials carrying out federal diktats, meanwhile, would take the blame for errors in policy and enforcement that are beyond their own control. *Id.* at 920, 930. And the vital check of an elected federal Executive to set enforcement priorities, the President, would be circumvented entirely. *Id.* at 922.

These defects, the Court found, were present even where state officers were enlisted to carry out only "discrete, ministerial tasks specified by Congress." *Id.* at 929.[2] In other words, even a tightly circumscribed delegation of federal authority to parties outside of the three branches of federal government—a delegation that might satisfy the "intelligible principle" standard that separates proper congressional

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[2] *See also New York v. United States*, 505 U.S. 144, 169 (1992) ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."); *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (Roberts, C.J.) ("Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system."); *id.* at 2660 (Scalia, Thomas, Kennedy, Alito, JJ., dissenting); *Alden v. Maine*, 527 U.S. 706, 751 (1999); *United States v. Lopez*, 514 U.S. 549, 576–77 (1995) (Kennedy, J., concurring).

conferral of executive power from unconstitutional delegation of legislative authority[3]—is still incompatible with the vesting of federal authority in the branches of the federal government, as opposed to third parties. *Id.* at 927–28. *Cf. New York*, 505 U.S. at 156–57 (explaining that the Tenth Amendment reflects limitations on the power of Congress). This limitation makes sense as a matter of political economy: politicians will contrive unusual arrangements such as conferring federal authority on third parties precisely where they will maximize political benefits, while minimizing political costs. *New York*, 505 U.S. at 182–83 (recognizing "the possibility that powerful incentives might lead [federal] officials to view departures from the federal structure to be in their personal interests"). Accordingly, even small deviations from the constitutional architecture are likely to carry major costs in terms of political accountability.

As between the political branches, the nondelegation principle "ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (citing *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissent-

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[3] *See Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 472 (2001).

ing in part); *United States v. Robel*, 389 U.S. 258, 276 (1967) (Brennan, J., concurring in result)). And as between the federal government and the states, the prohibition on coercive delegation of federal responsibilities to state actors, like other aspects of federalism, "serves to assign political responsibility, not to obscure it." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). But as between the federal government and private parties, the nondelegation principle serves not only to promote and clarify public accountability, but to ensure that it exists at all.

B. Delegation to Private Actors Facilitates Self-Dealing

It is no coincidence that every time the Court has considered an allegedly improper delegation of rulemaking authority to private actors, the law at issue raised serious concerns about self-dealing, whatever the merits of the delegation claim. The private parties most eager to exercise governmental power (or, barring that, to advise the government) are those seeking to gain an advantage on their competitors.

This trend begins with *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 522 (1935), which invalidated provisions of the National Industrial Recovery Act authorizing the President to approve comprehensive "codes of fair competition" devised by trade or industrial associations or groups. Four Jewish butchers—the Schechter brothers—were prosecuted for and convicted of violating the Live Poultry Code's "straight selling" requirement, which mandated that resellers purchase live chick-

ens only by the coop or half-coop, without selecting particular chickens. *Id.* at 527–28. This requirement was clearly a benefit to larger poultry operations—like those that devised the Code—but it was a costly inconvenience to their smaller competitors, particularly those catering to Jewish customers buying chickens individually in accordance with kosher practices. *See* Steven Horwitz, That's Not Kosher: How Four Jewish Butchers Brought Down the First New Deal, The Freeman, May 30, 2012.[4]

Although *Schechter Poultry* typically is cited for the Court's invalidation of the NIRA program as a standardless delegation to the Executive, the government also argued that Congress had properly and reasonably delegated policymaking authority to those "persons most vitally concerned and most familiar with its problems"—market participants. *Id.* at 537.[5] The Court rejected this argument out of hand, recognizing the cynicism underlying claims that businesses would look out for their competitors and the public good:

> But would it be seriously contended that Congress could delegate its legislative authority to

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[4] Available at http://www.fee.org/the_freeman/detail/thats-not-kosher-how-four-jewish-butchers-brought-down-the-first-new-deal.

[5] *See* Michael Froomkin, Wrong Turn in Cyberspace: Using ICANN To Route Around the APA and the Constitution, 50 Duke L.J. 17, 147 (2000) (describing how *Schechter Poultry* "involved both public and private delegation issues").

> trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises?...The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.

Id. at 537.

Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936), saw similarly untoward motives underlying a scheme authorizing larger coal producers, organized into district boards, to regulate their smaller competitors' labor practices:

> This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.... [Regulating the production of coal] is necessarily a governmental function, since, in the very nature of things, one person may not be intrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such

> power undertakes an intolerable and unconstitutional interference with personal liberty and private property.

Id.[6] *Cf. New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 127 (1978) (Stevens, J., dissenting) (criticizing a "California statute [that] gives private parties, serving their own private advantage, the unfettered ability to invoke the power of the State to restrain the liberty and impair the contractual arrangements of their new competitors.").

Even in cases where the Court has rejected private-delegation claims, the dynamic was the same. To begin with, *Currin v. Wallace*, 306 U.S. 1, 6 (1939), upheld the Tobacco Inspection Act, which allowed the Secretary of Agriculture to apply a statutory regulatory scheme to regional tobacco markets where at least two thirds of growers voted in favor of it. The scheme was challenged by warehousemen and auctioneers, who recognized that uniform standards for classification of tobacco would cost them money, while reducing demand for their ser-

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[6] The district boards were, in theory, open to any coal producer, their membership being "determined by the majority vote of the district tonnage during the calendar year 1934 represented at a meeting of the producers." Bituminous Coal Conservation Act of 1935, Pub. L. 74-402, § 4(a), 49 Stat. 991, 994. As a practical matter, however, majority-tonnage voting ensured that they were controlled by larger producers. That the parties challenging the private delegation could potentially have benefited from it, had they attempted to join the district board, was irrelevant to the Court's analysis.

vices. *Id.* at 7–8. Although the Court upheld the vote trigger, reasoning that it was merely a "restriction upon [Congress's] own regulation" and not a delegation of substantive policymaking authority, *id.* at 15–16, it recognized that the Act effectively shifted costs from growers to middlemen—which may explain why 96 percent of growers in the region at issue voted in favor of regulation. *Id.* at 7–9.

Similarly, *United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533, 546–48 (1939), upheld on identical grounds a scheme that allowed the Secretary of Agriculture to issue "milk orders" comprehensively regulating the handling and marketing of milk where such regulation was approved by two thirds of producers in a referendum. The milk order at issue imposed price floors on handlers, while exempting producer-run cooperative handlers. *Id.* at 560–61. The competitive effect was sufficiently devastating on non-cooperative handlers that Justice Roberts, writing in dissent, would have held the order constituted a taking without due process of law in violation of the Fifth Amendment. *Id.* at 583. *See also Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388, 399 (1940) (upholding provision authorizing coal producers organized into regional boards to "propose minimum prices").[7]

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[7] *Cf. Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) (challenge to referendum-triggered agricultural promotion program by producer disfavoring generic promotion that benefited its competitors); *United States v. United Foods, Inc.*,

In sum, it is bad enough that the exercise of discretion by government actors can be rife with conflicts of interest, from the subtle, *e.g.*, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886–87 (2009), to the blatant, *e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 298 (2004) (Scalia, J.) (noting "the traditional criterion of incumbency protection" in gerrymandering); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 306–307 (2003) (Kennedy, J., dissenting in part) (characterizing campaign-finance restriction as an "incumbency protection plan"). But there is no conflict, only naked self-interest, when private actors are authorized to exercise governmental power.

C. Delegation to Private Actors Violates the Constitution's Guarantee of Due Process

Due to the self-interest that necessarily controls private actors' exercise of delegated governmental power, schemes that confer such power on private actors inevitably raise serious due-process concerns. After all, "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." The Federalist No. 10, p. 59 (J. Cooke ed. 1961) (J. Madison).

Justice Brennan observed that the nondelegation principle has "roots both in the constitutional requirement of separation of powers...and in the Due

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533 U.S. 405 (2001) (same); *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005) (same).

Process Clause of the Fifth Amendment." *McGautha v. California*, 402 U.S. 183, 272 n.21 (1971) (Brennan, J., dissenting). *See also* Louis Jaffe, Lawmaking by Private Groups, 51 Harv. L. Rev. 201, 248 (1937) (regarding delegation as an issue "of reasonableness within the due process clause"). Of course, "[t]he doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.'" 402 U.S. at 272 n.21 (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)). *See also I.N.S. v. Chadha*, 462 U.S. 919, 963 n.4 (1983) (Powell, J., concurring). The Court made that link explicit in *Carter Coal*, describing the beggar-thy-competitor scheme at issue there as "so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question." 298 U.S. at 311 (citing, *inter alia*, *Schechter Poultry*, 295 U.S. at 537).[8]

The most apt of those decisions is *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 118 (1928), which concerned a zoning ordinance conditioning construction of a "philanthropic home for children or for old people" on the written consent of two thirds of its neighbors. These neighbors, the Court explained, "are not bound by any official duty, but are free to withhold consent for self-

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[8] *See also Carter Coal*, 298 U.S. at 318 (opinion of Hughes, C.J.).

ish reasons or arbitrarily and may subject the trustee to their will or caprice." *Id.* at 122. And, for that reason, "[t]he delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment." *Id. See also Eubank v. Richmond*, 226 U.S. 137 (1912) (holding that an ordinance permitting two thirds of owners of property abutting a street to establish "building lines" beyond which construction was illegal violated due process because "the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously").

Likewise, *Gibson v. Berryhill*, 411 U.S. 564, 578 (1973), invalidated the authority of a State Board of Optometry, comprised entirely of optometrists in private practice for their own account, to revoke the licenses of all optometrists in the State who were employed by business corporations—i.e., the Board members' competitors. The Court agreed with the district court's finding that "success in the Board's efforts would possibly redound to the personal benefit of members of the Board, sufficiently so that in the opinion of the District Court the Board was constitutionally disqualified" from passing judgment on its competitors. *Id.* It concluded that "those with substantial pecuniary interest in legal [or administrative] proceedings should not adjudicate these disputes." *Id.* at 579.

Roberge and *Berryhill* demonstrate that the exercise of discretionary governmental authority by private actors is simply incompatible with due-process

requirements. In other words, such delegations are among the "situations [that] have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Because private actors will inevitably act in their self-interest, typically financial, such delegations are, for due-process purposes, indistinguishable from cases "in which the adjudicator has a pecuniary interest in the outcome" and is therefore barred from presiding. *Id.* In that respect, private delegations are no different from run-of-the-mill cases invalidating convictions entered by judges whose compensation or official finances depended on levying fines. *E.g.*, *Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). *See also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

In sum, private delegation of discretionary governmental power "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U.S. at 47.

D. Delegation to Private Actors Violates the Constitutional Separation of Powers

At base, the problem with private delegation is that it seeks to circumvent the constitutional separation of powers, which in turn frustrates achievement of the Constitution's most basic purpose: to safeguard liberty. "The Framers recognized that, in the

long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). "[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." *Buckley v. Valeo*, 424 U. S. 1, 129 (1976). The Framers' solution, of course, was to separate and divide the powers of the government and thereby to "diffus[e] power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

But when discretionary authority is delegated to a private actor, rather than the Executive, Congress is able to aggrandize itself at the expense of the Executive. The intrusion on executive power inherent in private delegation is far more extreme than that rejected in *Free Enterprise Fund*, which held that insulation of inferior officers from Presidential control through double for-cause removal provisions "stripped [him] of the power our precedents have preserved, and his ability to execute the laws...." 130 S. Ct. at 3154. By contrast, the President has absolutely no authority to remove a private party whom Congress has designated to wield governmental power. The *Free Enterprise Fund* Court regarded with disbelief the government's "unwilling[ness] to concede that even *five* layers between the President and the Board would be too many," despite that the "officers of such an agency—safely encased within a

Matryoshka doll of tenure protections—would be immune from Presidential oversight, even as they exercised power in the people's name." *Id.* But that is the very result when private actors wield governmental power. *See also Bowsher*, 478 U.S. at 727–28 (rejecting scheme that conferred authority to require budget cuts on official who was not removable by the President).

Indeed, that is another reason why the "intelligible principle" standard that separates proper congressional conferral of executive power from unconstitutional delegation of legislative authority does not apply to delegations of executive power (including policymaking to fill in the details of a statutory scheme) to private actors. *See Whitman*, 531 U.S. at 472. Such arrangements inevitably are "contrary to Article II's vesting of the executive power in the President," *Free Enterprise Fund*, 130 S. Ct. at 3154, and violate the constitutional requirement that "all Officers of the United States are to be appointed in accordance with the [Appointments] Clause," *Buckley*, 424 U.S. at 132. Therefore, as *Carter Coal* suggests, private delegations of such authority are *per se* unconstitutional. 298 U.S. at 311.[9] *See also* Thomas

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[9] *Accord Pittston Co. v. United States*, 368 F.3d 385, 394 (4th Cir. 2004) (explaining that "[a]ny delegation of regulatory authority" to private actors violates the nondelegation principle); *Cospito v. Heckler*, 742 F.2d 72, 87 n.25 (3d Cir. 1984) (recognizing this Court's "antipathy to the delegation of policymaking responsibility to private organizations"); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143 (D.C.

Merrill, Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation, 104 Colum. L.R. 2097, 2168 (2004) ("If all federal government activity is confined to three branches, then Congress cannot delegate governmental authority (i.e., the authority to act with the force of law) to a fourth branch.").

"Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). And it is not at all difficult to see that liberty is placed at risk when Congress seeks to place the authority to make public policy in private hands.

II. Section 207 Is an Unlawful Delegation

The evils of delegation of policymaking authority to private actors are fully manifest in Section 207 of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, Div. B, § 207, 122 Stat. 4848, 4916–17 (2008) (PRIIA).

A. Section 207 directs the Federal Railroad Administration and Amtrak to "jointly...develop new or improve existing metrics and minimum standards

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Cir. 1984) (stating that delegation of executive authority to a private actor is a *per se* violation of the nondelegation principle); *Sierra Club v. Sigler*, 695 F.2d 957, 963 n.3 (5th Cir. 1983) ("[A]n agency may not delegate its public duties to private entities, particularly private entities whose objectivity may be questioned on grounds of conflict of interest.") (citation omitted).

for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services." 49 U.S.C. § 24101 note. Although government chartered, Amtrak "is not a department, agency, or instrumentality of the United States Government," but a private, "for-profit corporation," 49 U.S.C. § 24301(a)(2), (3), with nearly 10 million shares of common stock owned by private investors, National Railroad Passenger Corp. and Subs., Consolidated Financial Statements 24 (FY 2012).[10] Amtrak is, for the reasons stated in the Respondent's brief (at 33–43), a private actor for purposes of nondelegation analysis.[11]

Relying on the authority of Section 207, Amtrak and FRA issued final metrics and standards in May 2010. 75 Fed. Reg. 26839 (May 12, 2010). The rule sets standards for Amtrak's "on-time performance," which in turn may trigger obligations among freight railroads—which own most tracks and are Amtrak's competitors for use of track—to take additional

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[10] Available at http://www.amtrak.com/ccurl/137/692/Audited-Consolidated-Financial-Statements-2012.pdf.

[11] The government's contention to the contrary (at 45), relying on an opinion of the Office of Legal Counsel, is undercut by that opinion's assumption that Amtrak "do[es] not engage in regulation through...rulemaking," the very thing that it did in this instance. Holdover and Removal of Members of Amtrak's Reform Board, 27 Op. O.L.C. 163, 167 (2003).

measures to improve Amtrak performance at the expense of their own. *See Ass'n of Am. R.R.s v. U.S. Dep't of Trans.*, 721 F.3d 666, 669–70 (D.C. Cir. 2013). The rule also addresses "permissible delays," which are not held against the freight railroads, by providing that fault will be determined by reference only to Amtrak's Conductor Delay Reports, J.A. 138 & n.23, even though conductors are likely to lack information about the cause of any particular delay.

B. This self-serving arrangement is exactly what one would expect in terms of accountability when a private actor writes the rules to measure its own performance: passing the buck. As shown in the Respondent's brief (at 8–10), the metrics and standards have proven unworkable and unachievable. They appear to serve primarily to shift blame and ultimately costs for Amtrak's abysmal service onto Amtrak's competitors for the limited slots available on rail lines. *See also* Christopher Ingraham, The sorry state of Amtrak's on-time performance, mapped, Wonkblog, July 10, 2014[12] ("Amtrak is a heavily-subsidized rail service with Russian quality at Swiss prices. It is the shame of the developed world.").

But it's not just Amtrak that is evading accountability. The metrics and standards were developed

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[12] Available at http://www.washingtonpost.com/blogs/wonkblog/wp/2014/07/10/the-sorry-state-of-amtraks-on-time-performance-mapped/.

jointly with the FRA, which is Amtrak's funding agency and regulator, at the behest of Congress, which created Amtrak in 1970 and continues to subsidize it. Rail Passenger Service Act of 1970, Pub. L. No. 91-518, § 301, 84 Stat. 1327, 1330 (1970); Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, Div. L, Tit. I, 128 Stat. 5, 591–92 (2014). Understandably, Congress and the FRA would prefer to shift blame for Amtrak's lackluster performance to freight railroads, for which they are not directly responsible. And quite understandably, Congress might prefer to leave the details of this blame- and cost-shifting scheme to Amtrak and the FRA, rather than set them itself and attract the ire of the freight railroads and their customers. The result, in effect, is an implicit subsidy to Amtrak, but one that Congress does not have to justify, take heat for, or even fund—the money ultimately comes out of someone else's pocket. This lack of accountability is what results when the constitutional separation of powers is circumvented through private delegation.

C. The self-dealing involved in this scheme is plain on its face. Amtrak's policymaking largely absolves the carrier of responsibility for its own performance, while pinning the blame on its competitors for rail slots. Those competitors, in turn, are required to alter their operations to Amtrak's benefit. They also face the risk of sanctions based on failure to satisfy the metrics set by Amtrak, as well as the expectation that they will alter their operating agreements with Amtrak to incorporate those metrics. 49 U.S.C.

§ 24308(f); PRIIA § 207(c). Fundamentally, this is little different from the laws at issue in *Schechter Poultry* and *Carter Coal*: all of these cases concern schemes that authorize market participants to regulate the operations of their competitors for their own financial advantage. *See supra* § I.B. In that respect, Section 207, no less than the statutes in those other cases, "undertakes an intolerable and unconstitutional interference with personal liberty and private property." *Carter Coal*, 298 U.S. at 311.

D. Not only is the risk to due process plain on the face of Section 207, but Amtrak's actions in carrying it out demonstrate actual bias of the sort that "must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U.S. at 47. Section 207 authorizes Amtrak to set the standards by which its relationship with its competitors will be measured and judged. It did so, contriving metrics and standards that seriously disadvantage its competitors. Like the Optometry Board in *Gibson*, Amtrak's efforts redound to its own personal benefit. Not only that, but it rigged future proceedings by limiting the evidence proving "permissible delays" to only that which is seen by and known to Amtrak conductors, without further investigation or consideration. J.A. 138 & n.23. It is hardly consistent with the maxim that "no man is allowed to be a judge in his own cause" that a private actor can legally restrict the evidence that his competitors may rely upon in their disputes with it.

E. The government's arguments as to why the delegation principle does not apply in this instance, assuming that Amtrak is considered a private entity for these purposes, are unconvincing.

First, this is not an instance where Congress has merely conditioned the effectiveness of a regulatory scheme on a private actor's approval. *See* Pet. Br. at 20. Instead, consistent with Section 207, "the FRA and Amtrak jointly drafted performance metrics and standards for intercity passenger rail service...." J.A. 113. Subsequently, "[t]he FRA and Amtrak...considered the comments of the respondents," responded to those comments, and revised their proposed standards into a final rule, which they promulgated. 75 Fed. Reg. 26839 (May 12, 2010).

It may or may not have been "entirely reasonable," as the government argues (at 22), for Congress "to provide a distinct role for Amtrak," but that is irrelevant. After all, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *Chadha*, 462 U.S. at 944. Indeed, the government's reasonableness argument is the same one that the Court rejected out of hand in *Schechter Poultry*. *See* 295 U.S. at 537 ("The government urges that the codes will 'consist of rules of competition deemed fair for each industry by representative members of that

industry—by the persons most vitally concerned and most familiar with its problems.'").

Amtrak does not wield a "veto" of the kind upheld in *Currin* and *Rock Royal*. *See* Pet. Br. 21–23. It is not the case, as the government contends, that in *Rock Royal* "some private actors were able to decide what prices would apply (even to their competitors)." Pet. Br. at 24. Instead, as the Court's opinion describes, the milk order at issue was promulgated *by the Secretary of Agriculture* following public hearings and was subject to a referendum. 307 U.S. at 548. Indeed, the Court rejected a challenge that the governing statute authorized an unlawful delegation to milk producers on the ground that the producers' only power was to participate in the referendum. *Id.* at 577–78 (citing *Currin*, 306 U.S. at 15). By contrast, Amtrak is empowered by Section 207 to participate directly and significantly in the formulation of metrics and standards and, in fact, did so.

Second, Section 207 does not merely authorize Amtrak to play an advisory role in the formulation of performance metrics and standards, like in *Adkins*. *See* Pet. Br. at 25. Instead, its statutory mandate, as described above, is to develop them "jointly" with the FRA. It is not at all absolving that Amtrak and FRA were directed to "act 'in consultation with' various stakeholders other than Amtrak." Pet Br. at 25 (quoting Section 207). To the contrary, this shows that Congress knew how to specify when it intended a private actor to play an advisory role and that it

did not intend for Amtrak's role to be merely advisory.

Third, Section 207 is not rescued by its provision for appointment of an arbitrator in the instance that Amtrak and FRA are unable to reach agreement. *See* Pet. Br. at 27–29. In fact, this provision confirms Amtrak's power in the rulemaking process. If Amtrak were participating in only an advisory capacity, the FRA could simply address or reject its comments, according to the FRA's reasoned view of things, and then promulgate a final rule. Instead, the statute recognizes that Amtrak's power is equal to the FRA's in the process of setting metrics and standards and that, in the event the two clash, a third party may assist in resolving their differences.

Even if the arbitrator appointed were a government arbitrator—although the statute does not so provide—Amtrak would remain a party to the case, again on equal footing with FRA. When parties enter into arbitration, they do not suddenly cease to be invested in the underlying dispute, powerless to sway the proceedings. Instead, they become litigants, directly participating in the give-and-take of their case. The government's assumption to the contrary (at 27) is without support in law or common sense.

It would be one thing if, in the event Amtrak and the FRA were at loggerheads, the FRA was authorized to disregard Amtrak's views and proceed on its own, without any practical consequence for so doing—that would be closer to the approach approved in *Adkins*. But it is another thing entirely when the

FRA faces the choice between working with Amtrak to jointly develop metrics and standards or battling it out with the company in arbitration, with some third party making the final call. If sanctioned by the Court, this kind of convoluted scheme could facilitate private delegation in every instance, subject only to the theoretical limitation of government officials' willingness to roll the dice and see what comes of arbitration—something that could be expected to happen little or never. This power to coerce governmental officials in the exercise of their discretion is far removed from the kind of advisory role approved in *Adkins*, while carrying all the baggage of an outright private delegation. *See* Mark Seidenfeld, Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation, 41 Wm. & Mary L. Rev. 411, 457 & n.199 (2000) (explaining that such schemes "raise the specter of privately enacted law"). In practical effect, it is one.

CONCLUSION

Section 207 violates the nondelegation principle. The decision of the court below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-1080

IN THE

Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,
Petitioners,

v.

ASSOCIATION OF AMERICAN RAILROADS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* PROFESSOR ALEXANDER VOLOKH IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

The question presented by the Government is as follows:

1. Section 207(a) of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, Div. B, 122 Stat. 4916, requires that the Federal Railroad Administration (FRA) and Amtrak "jointly * * * develop" the metrics and standards for Amtrak's performance that will be used in part to determine whether the Surface Transportation Board (STB) will investigate a freight railroad for failing to provide the preference for Amtrak's passenger trains that is required by 49 U.S.C. 24308(c) (Supp. V 2011). In the event that the FRA and Amtrak cannot agree on the metrics and standards within 180 days, Section 207(d) of the Act provides for the STB to "appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." 122 Stat. 4917. The question presented is whether Section 207 effects an unconstitutional delegation of legislative power to a private entity.

Amicus proposes that the following question be added:

2. Whether Congress's grant of regulatory authority to Amtrak should be analyzed under the Fifth Amendment's Due Process Clause, rather than under a private delegation doctrine having no basis in this Court's precedent.

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Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 Harv. J.L. & Pub. Pol'y 931 (2014) 1, 10

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V 7

U.S. CONST. art. I, § 1 11

INTERESTS OF THE *AMICUS CURIAE*

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SUMMARY OF THE ARGUMENT

In the case below, the D.C. Circuit held that federal lawmakers could not delegate regulatory authority in any form to private entities. In doing so, it created a private delegation doctrine with no basis in this Court's precedent, muddled the constitutional private–public distinction, and left unanswered an important due process question. This Court should

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[1] Pursuant to Rule 37.6 *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief, and no person other than *amicus curiae,* its members, or its counsel made a monetary contribution to its preparation or submission.

The parties' letters consenting to the filing of this brief have been filed with the Clerk's office in conjunction with the certificate of service.

either affirm the decision below on due process grounds or vacate it and remand with instructions to consider Respondent's Due Process Clause argument.

By holding that even the provision of an intelligible principle was insufficient to sustain Congress's grant of authority to Amtrak, the D.C. Circuit misstated this Court's holdings in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), *Currin v. Wallace*, 306 U.S. 1 (1939), and *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533 (1939).

Rather than adopting a per se rule against delegation to private parties via the non-delegation doctrine, this Court has analyzed Congress's grants of authority to private entities under "the due process clause of the Fifth Amendment." *Carter Coal*, 298 U.S. at 311.

This Court has determined that Amtrak is a state actor for constitutional purposes, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), which implies that it is bound by the Due Process Clause. Even if *Lebron* did not control this case, Amtrak's actions under section 207 of the Passenger Railroad Investment and Improvement Act of 2008 are quintessential examples of state action. The D.C. Circuit's holding, that Amtrak can be private for non-delegation purposes but a state actor for First Amendment purposes, *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 677 (D.C. Cir. 2013), needlessly creates a second test for the constitutional private–public distinction.

Analyzing grants of regulatory authority to private entities under the Due Process Clause better protects accountability for two reasons. First, the Due Process Clause is naturally suited to issues of fairness and impartiality, which better corresponds to the concerns that one might have regarding private delegations. Second, it is incorporated against the states through the Fourteenth Amendment. Third, it preserves the availability of a damages action for injured parties.

ARGUMENT

I. The D.C. Circuit's Private Delegation Theory is Contrary to Supreme Court Precedent.

The D.C. Circuit's private delegation theory is contrary to Supreme Court precedent because: (1) this Court has previously upheld delegation of authority to private parties; and (2) this Court has not previously found delegation to private parties to be more suspicious under the non-delegation doctrine than delegation to public parties. *Carter Coal*, which the D.C. Circuit relied on for its private non-delegation holding, is more properly understood not as a non-delegation case at all, but as a due process case. This Court should resolve the confusion among lower courts, which have mixed due process restrictions with delegation principles.

A. This Court has Repeatedly Upheld a Delegation of Authority to Private Parties.

This Court upheld a delegation to private parties in *Currin v. Wallace*, 306 U.S. 1 (1939) and *United States v. Rock Royal Coop.*, 307 U.S. 533, 577 (1939).

Currin concerned a challenge to the Tobacco Inspection Act of 1935. The Act authorized the Secretary of Agriculture to (1) establish uniform standards for tobacco and (2) designate tobacco markets where no tobacco could be sold unless it was inspected and certified according to those standards. However, the Secretary was forbidden from designating a market unless two-thirds of the growers in that market voted in favor of the designation in a referendum. *Currin*, 307 U.S. at 15. Industry members thus held an "on–off" power to determine whether predetermined regulations would go into effect. Such a power has often been analyzed under the non-delegation doctrine. *See Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 386 (1813); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 694 (1892); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935). In *Currin*, this Court upheld the delegation to the industry members and did not distinguish the delegation from the delegation to the President upheld in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928). *See Currin*, 306 U.S. at 15. Therefore, the delegation of power did "not involve any delegation of legislative authority." *Id.*

The fact that this Court has upheld a delegation to private parties by analogy to a similar delegation to the President—without expressing any reservations based on the private nature of the delegates—proves that the non-delegation doctrine does not distinguish between public and private parties.

Rock Royal concerned a challenge to the Agricultural Marketing Agreement Act of 1937, a statute aimed at assisting in the marketing of agricultural commodities. *Rock Royal Coop.*, 307 U.S. at 542–43. The Act authorized the Secretary of Agriculture to make orders restoring parity prices for farmers of specific farm products. *Id.* at 574–75. Orders could become effective in two ways: (1) Consent of the handlers; or (2) two-thirds support from the producers (by number or volume and if the Secretary of Agriculture, with approval of the President, once determined that the failure to consent by the handlers obstructed the declared policy of the act). *Id.* at 547. This Court held that a delegation to private parties of the "on–off" power to put an order into effect did not violate the non-delegation doctrine. *See id.* at 577. This Court reasoned that because Congress could place the order into effect without any vote, it was permissible for it to "provide for approval or disapproval in such way or manner as it may choose." *Id.* at 578. This Court recognized "the delegation of authority to producers to approve a marketing order without an agreement of handlers." *Id.* at 574, 577. Notably absent from the analysis is any mention of the public or private nature of the holders of their delegated powers.

B. Private Delegations Are Not More Suspicious Than Public Ones

It is true that *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), has language questioning the legitimacy of private delegations:

> [W]ould it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title I? The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.

Id. at 537. But this discussion was dictum. Moreover, this Court went on to find the delegation invalid because the statute insufficiently constrained the President; the constraints on the President were, this Court found, likewise insubstantial. Thus, *Schechter* had no occasion to opine on whether the non-delegation doctrine constrained delegations to private parties more than it to public parties.

C. *Carter Coal* is Most Properly Seen as a Due Process Case, Not a Non-Delegation Case.

The D.C Circuit chiefly relied on *Carter Coal* in disapproving of private delegation. *See Ass'n of Am. R.Rs.*, 721 F.3d at 670–71. But, while *Carter Coal* did disapprove of a private delegation, its holding was not based on the non-delegation doctrine.

In *Carter Coal*, this Court disapproved a delegation of power to some members of industry to impose regulations on other members of industry, finding it to be "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Carter Coal*, 298 U.S. at 311. However, the mere recitation of the word "delegation" does not imply an invocation of the non-delegation doctrine. *Cf. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982) (holding that "delegating a governmental power to religious institutions" implicates the Establishment Clause).

In fact, *Carter Coal* specifically states which part of the Constitution is implicated: "[A] statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is . . . clearly arbitrary, and . . . clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment . . . ." *Carter Coal*, 298 U.S. at 311; *see also* U.S. CONST. amend. V.

This Court has repeatedly recognized that *Carter Coal* is a due process case, not a non-delegation doctrine case. *See Mistretta v. United States*, 488 U.S. 361, 373 (1989) (listing *Panama* and *Schechter* as the only two cases to strike down statutes under the non-delegation doctrine, and omitting *Carter Coal*); *accord Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 474 (2001); *see also Synar v. United States*, 626 F. Supp. 1374, 1383 n.8 (D.D.C. 1986) (per curiam), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986) (panel decision of three judges, including then-Judge Scalia, stating that, although *Carter Coal* "discussed" the delegation doctrine, its holding seems to rest primarily on the Due Process Clause).

A delegation of regulatory power to a financially interested party may violate the Due Process Clause; however, it does not violate the non-delegation doctrine, provided an intelligible principle is present. In this case, Amtrak's statutory intelligible principle is that it "shall be operated and managed as a for-profit corporation." 49 U.S.C. § 24301(a). This principle is intelligible enough to save the Congressional delegation from invalidity.

In contrast to the non-delegation approach, the due process approach finds support in many of this Court's cases.

In *Eubank v. City of Richmond*, 226 U.S. 137 (1912), this Court examined a city ordinance allowing the owners of two-thirds of the property abutting a street to establish a "building line" beyond

which construction would be illegal. This Court held that this ordinance violated due process:

> The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously. . . .
>
> This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power.

Id. at 143–44. In other words, there was no protection against the property holders' using their coercive power arbitrarily or to serve their own purposes.

In *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), a city ordinance allowed the construction of a "philanthropic home for children or for old people" in a particular residential district with the written consent of the owners of two-thirds of the property within 400 feet. *Id.* at 118. In language reminiscent of *Eubank*, this Court wrote that it violated due process to give coercive power over the property owner to a minority of property owners who could dissent or abstain "for selfish reasons or arbitrarily," "uncontrolled by any standard or rule prescribed by legislative action" and

without any "provision for review." *Id.* at 122; *see generally* Volokh, *supra*, at 941–42.

Against this background, it is clear that *Carter Coal*—with its paean to disinterestedness and its reference to the uncontrolled self-interest of private parties—fits comfortably into the due process line of cases. The *Eubank–Roberge–Carter Coal* rule is still good law. *See Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (prohibiting an optometry board from conducting delicensing proceedings against an optometrist employed by a corporation, because the board members were all private, self-employed optometrists who had a "substantial pecuniary interest" in the proceeding). The private non-delegation approach, however, is not supported by a single case from this Court. And it is the non-delegation approach that the D.C. Circuit explicitly embraced. *Ass'n of Am. R.Rs.*, 721 F.3d at 670, 677 (refusing to consider Respondent's due process argument). Thus, the D.C. Circuit decision is contrary to Supreme Court precedent.

D. This Area of Law Should Be Clarified Because Lower Courts Have Persistently Been Confused

This Court should clarify this area of law because lower courts have intermingled or otherwise confused due process and non-delegation doctrine restrictions on delegation. *See Pittston Co. v. United States*, 368 F.3d 385, 398 (4th Cir. 2004) (intermingling due process concerns with non-delegation concerns); *see also Cospito v. Heckler*,

742 F.2d 72, 87 n.25 (3d Cir. 1984) (intermingling *Schechter* and *Roberge*); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143 (D.C. Cir. 1984) (describing non-delegation problems as greater when allocated to private individuals); *United States v. Mazurie*, 487 F.2d 14, 19 (10th Cir. 1973), *rev'd on other grounds*, 419 U.S. 544, 557 (1975) ("Congress cannot delegate its authority to a private, voluntary organization, which is obviously not a governmental agency, to regulate a business on privately owned lands, no matter where located.").

II. Policing Private Delegations Through the Due Process Clause Makes Greater Jurisprudential Sense.

A. Non-Delegation and Due Process Concerns are Analytically Distinct

The non-delegation doctrine and the Due Process Clause are analytically distinct and serve two different purposes. The non-delegation doctrine is derived from the Vesting Clause of Article I, Section 1 of the U.S. Constitution. *Mistretta v. United States*, 488 U.S. 361, 373 (1989); *see also* U.S. CONST. art. I, § 1. The doctrine is rooted in separation of powers principles and prohibits Congress from delegating its legislative power—thus, it applies only to federal delegations. *See Mistretta*, 488 U.S. at 371–72. To prevent the delegation of power from becoming a forbidden delegation of *legislative* power, Congress must provide an "intelligible principle to which the person or body authorized to [exercise the

delegated authority] is directed to conform." *Id.* at 372.

The Due Process Clause, however, applies to both federal and state action, and it protects concepts of fundamental fairness. *Hurtado v. California*, 110 U.S. 516, 535–36 (1884). A delegation of regulatory power to a financially interested party implicates the Due Process Clause if the party is a state actor. *See Tumey v. Ohio*, 273 U.S. 510, 532 (1927). The financial interest prevents the party from acting impartially, which is an affront to fundamental fairness. *Id.* at 535.

Contrary to the D.C. Circuit's view, these are separate issues. *See Ass'n of American Railroads*, 721 F.3d at 671 n.3. For example, a very specific statute that rewards judges based on the number of convictions would violate due process but not the non-delegation doctrine. Conversely, a hypothetical statute lacking an intelligible principle would not violate due process if the agency implemented the statute with scrupulously fair regulations, but it would violate the non-delegation doctrine because an agency cannot cure Congress's failure to supply an intelligible principle. *See Am. Trucking Ass'n*, 531 U.S. at 472–73.

B. The Fairness Concerns That Drive Hostility to Private Delegation Fit Most Naturally Into a Due Process Framework.

Where bias or fairness is the issue, this Court has consistently provided analysis under a due process

framework. In examining bias, this Court will particularly scrutinize a state actor "occup[ying] two practically and seriously inconsistent positions," one of which is subject to bias—particularly financial bias—and the other of which is regulatory. *Ward v. Village of Monroeville*, 409 U.S. 58, 60 (1972).

Part I.C above listed due process cases where the state actor was private, but there is no separate due process doctrine where private actors are involved: indeed, the main cases in this line of doctrine concern government employees. As a general matter, government employees are presumed to be impartial in the execution of their authority; however, when a state actor has a "direct, personal, substantial pecuniary interest" in the result, he has a motivation to act in his own interest. *Id.* (quoting *Tumey*, 273 U.S. at 523). Thus, when there is a substantial pecuniary interest at stake, there is a high likelihood that the delegation will be found unconstitutional under due process.

For example, during Prohibition in the 1920s, an Ohio statute stated that in cases involving violations of the prohibition law, judges would receive a portion of any resulting fines. *Tumey*, 273 U.S. at 516–20. One Ohio mayor served as a judge, and the only way for the mayor and other official parties involved in the arrest to receive their portion of the fine was if the accused were found guilty. *Id.* at 521–23. Due process was violated because a criminal defendant's liberty and property was subjected to a court where the judge had a "direct, personal, substantial

pecuniary interest" in a particular outcome. *Id.* at 523.

In a similar case, a substantial part of the income of the village of Monroeville, Ohio, was derived from fines obtained from violations of certain ordinances and traffic offenses. *Ward*, 409 U.S. at 58. The Mayor of Monroeville acted as a judge in this case as well, and although the mayor did not benefit financially from the resulting fines, this Court held that the situation still introduced a substantial pecuniary interest that prevented the mayor from acting as an impartial judge. *Id.* at 60. This Court in *Ward* suggested that the test for bias in these cases is whether the situation "is one which would offer a possible temptation to the average man . . . which might lead him not to hold the balance nice, clear, and true" between the competing interests. *Id.* (internal quotation marks and citations omitted). In both *Tumey* and *Ward*, this Court could not have reached the same result under a non-delegation analysis. Most obviously, a state statute was involved, so the non-delegation doctrine could not possibly have been implicated. Moreover, the delegation of power did not lack an "intelligible principle," but rather, the delegation of power lacked the fundamental guarantee of an impartial judge. When a party has a financial interest in a particular outcome, the likelihood is high that the party cannot be impartial, thus violating due process.

In *Aetna Life Ins. Co. v. Lavoie*, an Alabama Supreme Court justice was the deciding vote on a 5–4 decision regarding punitive damages on a bad-faith

claim against Blue Cross-Blue Shield of Alabama. 475 U.S. 813, 816–17 (1986). The justice was also a party in a pending lawsuit against Blue Cross-Blue Shield of Alabama, and the decision of the Alabama Supreme Court would be binding in that case. *Id.* at 817. The decision "had the clear and immediate effect of enhancing both the legal status and the settlement value of [the justice's] own case," and this Court found clear bias and a violation of due process. *Id.* at 823–25.

Under a due process analysis, bias is the issue. Private parties wielding power can often be shown to be biased, to the extent that they can be tempted to use their power one way rather than another because of their self-interest—as in *Eubank*, *Roberge*, and *Gibson*. But this is not always the case. *See Schweiker v. McClure*, 456 U.S. 188 (1982) (upholding delegation of authority to administer Part B Medicare payments, and adjudicate disputed claims, to private insurance companies like Blue Shield of California, finding no bias because hearing officer salaries and medical claims were paid by the federal government, not by corporations). Similarly, one might often presume public parties wielding power to be disinterested, but *Tumey* and *Ward* show that this presumption can be overcome with details of compensation arrangements. The private–public distinction as such is not significant. What is significant is the extent to which one can show a likelihood of bias.

C. Resting the Decision on Due Process Grounds Would Properly Cover State as well as Federal Delegations and Hold Open the Potential for Damages.

The D.C. Circuit suggested that the choice between the non-delegation doctrine and the Due Process Clause was merely a "change in the label" that would not effect a change in the inquiry. *See Ass'n of Am. R.Rs.*, 721 F.3d at 671 n.3. But these doctrines are distinct in several ways. In the first place, the non-delegation doctrine, with its grounding in the Article I Vesting Clause, only applies to delegations by Congress and has no applicability to state delegations. This case admittedly involves a federal statute, but in general, it makes sense to ground the holding in a doctrine—like due process—that is equally applicable to federal and state governments. The primary problem here is the same as in *Eubank*, *Roberge*, and *Gibson*—all cases where state governments granted power to self-interested parties.

Moreover, when the Due Process Clause is at issue, 42 U.S.C. § 1983 or *Bivens* provide actions for money damages. *See Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).[2] But no money damages are available for violations of the non-delegation doctrine. Resting this holding on

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[2] The *Bivens* remedy was expressly extended to due process violations in *Davis v. Passman*, 442 U.S. 228 (1979).

the Due Process Clause makes sense when bias and unfairness are at issue, since it is well accepted that plaintiffs are entitled to money damages for injuries they cause.

D. A Due Process Holding Would Incorporate the Existing State Action Inquiry Rather than the D.C. Circuit's Newly Invented Public–Private Distinction.

It is clear that Amtrak is a state actor. This Court concluded as much in *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995):

> We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.

Id. at 399–400. Because this Court concluded that Amtrak, as a corporation, was "part of the Government" on account of its foundation and structure, everything that Amtrak does, much like everything a government employee does in the scope of his employment, is state action. *Lebron* arose in a First Amendment context, but the state-action doctrine applies in the due process context exactly the same way. The application of the Due Process Clause to Amtrak thus poses no problems.

Even if *Lebron* did not apply here and Amtrak were considered private, one would have little trouble concluding that Amtrak is a state actor. Amtrak's actions in this case are even more consistent with those actions generally reserved for the government than those it took in *Lebron*. The Passenger Rail Investment and Improvement Act of 2008 gives Amtrak equal authority with the Federal Railroad Administration to develop performance standards and metrics for quality of passenger train operations. 49 U.S.C. § 24101. The creation of regulatory standards is state action typically reserved for government agencies. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974) (acknowledging that the government created regulatory standards over public utilities and that this Court has found state action "present in the exercise by a private entity of powers traditionally exclusively reserved to the State").

Amtrak's proposed standards surely qualify as regulation for purposes of the "public function" test for two reasons: (1) They were published for public comment, and criticism was reflected in the final version of the metrics and standards—similarly to how federal agencies regulate through a notice and comment process; and (2) the Surface Transportation Board may impose fines based on failure to comply with specific regulations imposed by Amtrak. Amtrak's equal status with the FRA in imposing national regulations shows that Amtrak is a state actor for due process purposes.

However, while the state-action doctrine establishes that Amtrak is "public enough" that it needs to respect constitutional rights, the D.C. Circuit's anti-private-delegation approach relies on establishing, on the contrary, that Amtrak is "private enough" that it cannot be delegated regulatory power from Congress. To thread this needle, the D.C. Circuit was forced to create a separate, ad hoc private–public distinction relying on Amtrak's degree of accountability and degree of self-interestedness. *Ass'n of Am. R.Rs.*, 721 F.3d at 675–76. As noted before, this inquiry has no support in this Court's case law, and the proliferation of public–private tests is confusing and unnecessary where a perfectly serviceable due process inquiry with substantial support in case law exists.

E. The Amtrak Delegation Plausibly Violates Due Process, and the Due Process Argument Was Preserved and Not Reached Below.

As noted in Part II.B above, a due process analysis looks to whether bias is present, regardless of whether the actor is private (as in *Eubank*, *Roberge*, and *Carter Coal*) or public (as in *Tumey*, *Ward*, and *Lavoie*). Whether Amtrak is actually part of the government, or is merely considered so for constitutional purposes, is irrelevant. The central question is whether Amtrak is biased. In this case, Amtrak is motivated by self-interest—a motive statutorily endorsed by Congress.

The likelihood of bias is clear. Amtrak is a corporation, and directors of corporations have a

duty to shareholders to maximize the corporation's profit. A corporation could advance its profit goals by creating industry regulations that harm its competitors and increase its own profits. Such presumptively biased regulation, made by a private party whose interest is adverse to its industry competitors, is exactly what *Carter Coal* sought to prohibit. *Cf. L.A. Gas & Elec. Corp. v. R.R. Comm'n of Cal.*, 289 U.S. 287, 311 (1933). The presence of bias is confirmed by the very statute creating Amtrak. Congress not only gave Amtrak the ability to "make agreements with the private sector and undertake initiatives . . . designed to maximize its revenues," 49 U.S.C. § 24101(d), but also *mandated* that Amtrak act as a for-profit corporation. *Id.* § 24301(a). Congress not only gave Amtrak the power to regulate its own industry, but also effectively mandated that Amtrak undermine its competitors when doing so.

Congress's delegation to Amtrak allows Amtrak to regulate the freight rail industry, including Amtrak's competitors, according to its own self-interest, which is the "vice of the ordinance." *Eubank*, 266 U.S. at 144. Amtrak's competitors have no protection from Amtrak using its coercive power to maximize profits at the competitors' expense. Legislative delegation that allows the delegate to regulate "for selfish reasons or arbitrarily. . . is repugnant to the due process clause of the Fourteenth Amendment." *Roberge*, 278 U.S. at 122. Because the likelihood of bias is so great, the power delegated to Amtrak is a clear violation of the Due Process Clause.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed on the alternative ground that the delegation to Amtrak violates the Due Process Clause. Alternatively, the case should be remanded for due process analysis.

Respectfully submitted,

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